Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1975

75-30

LUCILE MONK, ET AL., *Petitioners*

v.

CHAMBERS & KENNEDY, ET AL., *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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UNITED STATES CONSTITUTION

Article 3, Section 2, Clause 1 2

IN THE

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OCTOBER TERM 1975

LUCILE MONK, ET AL., *Petitioners*

v.

CHAMBERS & KENNEDY, ET AL., *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

I. Decisions Below

The decision of the Court of Appeals is reported as Dearborn Marine Service, Inc. v. Chambers & Kennedy, 499 F.2d 263 (5th Cir. 1974). The decision of the District Court is reported as Armstrong v. Chambers & Kennedy, 340 F.Supp. 1220 (S.D. Texas 1972). (See Appendix)

II. Grounds of Jurisdiction

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit sought to be reviewed

was dated and entered on August 22, 1974. A petition for rehearing en banc was denied by order dated and entered on April 7, 1975. The Honorable John Brown, Chief Judge of the Court of Appeals, filed a dissent to the denial of the petition for rehearing on April 23, 1975. (See Appendix) No extension of time for filing of this petition has been sought. Jurisdiction is conferred upon this court by 28 U.S.C.A. §1254(1).

III. Questions Presented for Review

A. Whether the Outer Continental Shelf Lands Act ousts the maritime laws application to the death of an offshore worker aboard a vessel 12 miles from shore because the agent causing the wrong is initially emitted from an artificial island.

B. Whether the Outer Continental Shelf Lands Act ousts the Death on the High Seas Act's applicability to the death of an offshore worker on a vessel 12 miles from shore because the agent causing the wrong is initially emitted from an artificial island.

C. Whether there was evidence to support the trial court's finding that William Monk was within the vessel when the flaming ball of fire fell on it and was not killed immediately but sought to find some way to escape, and for a period of several minutes until death overtook him at the forepeak suffered excruciatingly.

IV. Constitutional Provisions and Statutes Involved

Article 3, Section 2, Clause 1, United States Consititution: "The judicial power shall extend to all cases * * * of admiralty and maritime jurisdiction * * *."

Death on the High Seas Act, 46 U.S.C. §761:

> "Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation, which would have been liable if death had not ensued. Mar. 30, 1920, c. 111, §1, 41 Stat. 537."

Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1333 (a)(1) and (a)(2):

> "(a)(1) The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands and fixed structures which may be erected thereon for the purpose of exploring for, developing, removing and transporting resources therefrom, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State: *Provided, however,* That mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter.
>
> (2) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State as of August 7, 1953 are declared to be the law of the United States for

that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf."

V. Statement of the Case

William C. Monk met his death while performing his duties aboard the M/V CARRYBACK, an 85-foot vessel of 136 gross tons. At the time of the death, the vessel was in service approximately 12 miles from the Texas shore. The death was caused when a fireball emitted from a fixed storage platform involved in production of oil from the Outer Continental Shelf descended on the vessel.

Three other men met their death aboard the vessel, and the vessel itself was gutted by fire. The decision of the Court of Appeals for the Fifth Circuit would apply general maritime law to the destruction of the vessel, would apply general maritime law and the Death on the High Seas Act to the three persons aboard the vessel other than Monk, and applies Texas law to Monk. Under Texas law at that time, contributory negligence was a complete bar to recovery, and Monk's widow and children were denied recovery against the defendant who owned and operated the "bomb" sitting out in the Gulf of Mexico and the defendant whose employees negligently

caused the bomb to explode, because the district court also found Monk at fault in failing to give more explicit instructions to an independent contractor.

VI. Jurisdiction of the Trial Court

Jurisdiction of the trial court was founded under the Death on the High Seas Act, 46 U.S.C. § 761; the general maritime law, 28 U.S.C.A. § 1333; and the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(a)(2).

VII. Argument

The decision of the Court of Appeals for the Fifth Circuit is contrary to this Court's interpretation of the Outer Continental Shelf Lands Act in *Rodrique v. Aetna Casualty & Surety Co.*, 395 U.S. 352, (1969); is contrary to this Court's definition of admiralty jurisdiction in *Executive Jet Aviation v. Cleveland*, 409 U.S. 249 (1972); and is contrary to this Court's determination in *Hough v. Western Transportation Co.*, 3 Wall. 20 (1866) ("The Plymouth"), that consummation of a wrongful act upon navigable waters involving the operation of a vessel would make applicable admiralty jurisdiction and the maritime law, and in this regard, is contrary to the Fifth Circuit's own decisions in *In Re Motor Ship Pacific Carrier*, 489 F.2d 152, 156-157 (5th Cir. 1974) and *Kelly v. Smith*, 485 F.2d 520, 523-526 (5th Cir. 1973); and the decision of the Sixth Circuit in *Smith v. Lampe*, 64 F.2d 201, 202 (6th Cir. 1933)

Prior to *Executive Jet Aviation*, the locality test was generally recognized as the touchstone to admiralty jurisdiction and application of the general maritime law.

Under any prior standards, the accident in question, occurring aboard a vessel in navigable waters, would fall within the admiralty jurisdiction. The fact that the negligent act which caused the catastrophe initiated from land has always deemed non-erosive of admiralty jurisdiction so long as the act or wrong was consummated in injury on the navigable waters. *Hough v. Western Transportation Co.*, supra, 3 Wall. 20; *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 205-206 (1971).

In *Executive Jet Aviation*, the locality test was rejected as the sole determinative factor, although it remains necessary that the wrong be consummated on navigable waters. The Court determined that it was also necessary to show in order for admiralty jurisdiction to attach that the wrong "bears a significant relationship to maritime activity." *Executive Jet Aviation v. Cleveland*, supra, 409 U.S. at 268. In the present case, we have a vessel in the Gulf of Mexico standing by to transport workmen to and from the shore and the artificial islands in the Gulf. We submit that nothing is more maritime than a vessel in such service at such location. We further submit that there is a significant relationship to maritime activity that the owner and operator of an artificial island located as it is, not only in proximity to but actually in the sea, might maintain his facility in such a way that it might explode and cause damage to vessels in close proximity, cause oil spills which pollute the waters, or otherwise interrupt shipping in the area.

Examples of such activity as being within the notion of traditional maritime activity are shown in *In Re Motorship Pacific Carrier*, supra, 489 F.2d 152; *Kelly v. Smith*, supra, 485 F.2d 520; *Southern Bell Telephone &*

Telegraph Co. v. Burke, 62 F.2d 1015 (5th Cir. 1933); *The American*, 34 F. Supp. 855 (E.D.N.Y. 1940); *Smith v. Lampe*, supra, 64 F.2d 201 (6th Cir. 1933). In the *Motorship Pacific Carrier's* case, smoke emitted from a paper mill interfered with the vision of a vessel in operation on the Savannah River Ship Channel, causing the vessel to collide with a bridge. In *Kelly v. Smith*, an individual fired a gunshot from the shore, injuring the pilot aboard a small river craft in the Mississippi River. In *Smith v. Lampe*, the sound from an automobile horn interfered with the navigation of two vessels, causing their collision. In *The American*, a shore based plant emitted fumes or gas over the adjacent waters to interfere with the navigation of a vessel.

We respectfully submit that the emission of a fireball from an artificial island causes greater interference with navigation of vessels in close proximity than did the emissions referred to in the above cited cases.

But even more clearly maritime law would be applicable to the incident in question because of the Death on the High Seas Act. In *Executive Jet Aviation*, the Court recognized:

> "Of course, under the Death on the High Seas Act, a wrongful-death action arising out of an airplane crash on the high seas beyond a marine league from the shore of a state may clearly be brought in a federal maritime court." *Executive Jet Aviation, Inc. v. Cleveland*, supra, 409 U.S. at 271, note 20.

Thus, it must be beyond argument that maritime law—whether under the traditional maritime activity standard

or by force of the Death on the High Seas Act—is clearly applicable.

The question remains whether Congress intended to oust admiralty jurisdiction by passage of the Outer Continental Shelf Lands Act. This Court's decision in *Rodrigue* demonstrates that Congress had no such intention. The Court perceived that Congress made state law applicable to artificial islands because maritime law was not applicable. The Court explained:

> "Careful scrutiny of the hearings which were the basis of eliminating from the lands act the treatment of artificial islands as vessels convinces us that the motivation for this change, together with the adoption of state law as surrogate, federal law was the view that maritime law was inapposite to these fixed structures. * * * The decision to do so * * * recognized that if [state law] were not adopted explicitly, maritime law simply would not apply to these stationary structures not erected as navigational aides." *Rodrique v. Aetna Casualty & Surety Co.*, supra, 395 U.S. at 363-364.

Thus the Court in *Rodrigue* did not undertake to interpret the Outer Continental Shelf Lands Act as ousting maritime law for state law but rather recognized that state law was applicable because maritime law was not.

Here the circumstances of the catastrophe aboard the vessel invoke admiralty jurisdiction and maritime law. Thus, under the Court's analysis the Outer Continental Shelf Lands Act would have no impact upon an incident to which maritime law would have traditionally applied.

This must be particularly true where the state law being utilized (contributory negligence bars recovery) is inconsistent with otherwise applicable maritime law (contributory negligence mitigates damages). See *Pope & Talbot v. Hawn*, 346 U.S. 406 (1953).

Moreover, it must be kept in mind that the Fifth Circuit's attempt to justify the apparent disparaging treatment allocated Monk's widow and children and the three other men killed aboard the vessel, as well as the property damage to the vessel itself is based upon the fact that Monk was a "platform worker"[1] and also that he was found (rightly or wrongly) to have played a role in the holocaust. As to the first distinction, the Court has never limited maritime law to those who work as seamen aboard vessels. See *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946) *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959); *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206 (1963).

As to the second distinction, it must be kept in mind that the determination of relative or co-relative fault in connection with an incident such as this may not be made until a final trial on the merits. It would seem inappropriate at least to have admiralty jurisdiction hinge upon whether there is an allegation and subsequent finding of contributory negligence. It must also be kept in mind that the captain of the vessel Carryback was found at fault in connection with the incident. Would this

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1. This designation by the Court of Appeals does not imply that it was fortuitous that Monk was aboard the vessel. Indeed the Court recognizes that he was performing his routine duties aboard the vessel. 499 F.2d at 267. (R. 520-521).

mean that state law should be applicable in determining the damages to the vessel, and thus render inapplicable proceedings for Limitation of Liability and such underlying matters as general average.

We respectfully submit that the decision of the Fifth Circuit is calculated to cause significant confusion in the law regarding the respective rights of persons involved in offshore drilling activities and should be reversed.

With regard to the question of the sufficiency of the evidence to sustain the trial judge's finding of pain and suffering prior to death, the court of appeals recognized that the evidence shows that Mr. Monk was last seen in his cabin approximately 15 minutes prior to explosion (R. 1353-1354) and that his remains were found at the furtherest forepeak of the vessel (R. 430). We believe it was a permissible conclusion by the district court that Mr. Monk was alerted by the explosion and attempted to flee from the fire seeking refuge at the place aboard the vessel furtherest from the fire. We further believe it a reasonable conclusion that in so doing and in so dying he suffered pain and mental anguish. The ground of reversal stated by the Court of Appeals was that the conclusion of the trial judge was speculative. In this regard, we respectfully submit that the Court of Appeals simply substituted its own judgment for that of the district court charged with the responsibility of hearing the evidence and deciding the case. Thus, the Court of Appeals went far beyond the clearly erroneous standard. We respectfully request that this portion of the Court of Ap-

peals' decision likewise be reviewed, and upon review, be reversed.

Respectfully submitted,

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Certificate of Service

Copies of the foregoing Petition for Writ of Certiorari have been served this 2nd day of July, 1975, on the following counsel of record:

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SIDNEY RAVKIND

APPENDIX A

IN THE

United States District Court

FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 70-H-1171
AND CONSOLIDATED CASES

WEBSTER BARNWELL ARMSTRONG, III, ET AL
v.
CHAMBERS & KENNEDY, ET AL

In the Matter of the
Following Cases From

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
LAFAYETTE DIVISION

CIVIL ACTION NO. 16305
71-H-626

LEO MEAUX, ADMR. OF THE ESTATE AND
SUCCESSION OF EUGENE MEAUX, ET AL
v.
CHAPMAN CONTRACTING SERVICE COMPANY,
INC., ET AL

CIVIL ACTION NO. 16401
71-H-686

LEO MEAUX, JR.
v.
CHAMBERS & KENNEDY, ET AL

CIVIL ACTION NO. 16404
71-H-627

ROY MELANCON
v.
DRILLING ENGINEERING, INC., ET AL

CIVIL ACTION NO. 15878
71-H-625

CLEMILLE CREDEUR, ET AL
v.
TRAVELERS INSURANCE COMPANY, ET AL

INTERLOCUTORY JUDGMENT

The above-captioned causes from the United States District Court, Western District of Louisiana, Lafayette Division, having been transferred to the United States District Court for the Southern District of Texas, Houston Division, for trial on the issue of liability only, and being consolidated with Civil Action No. 70-H-1171, Webster Barnwell Armstrong. III, et al. v. Chambers & Kennedy, et al. for this purpose, and after hearing the evidence and receiving the briefs and arguments of counsel a Memorandum and Order was filed by the court on March 7, 1972, which constitutes the Findings of Fact and Conclusions of Law on all issues of liability, and is made a part of this judgment, it is

ORDERED, ADJUDGED and DECREED that plaintiffs in the said captioned causes asking damages for the deaths of Eugene Meaux and Franklin J. Credeur and for personal injuries to Roy Melancon and Leo Meaux shall each have and recover from Chambers & Kennedy and

Drilling Engineering, Inc., jointly and severally, their provable damages as determined by the laws of the State of Texas under provision of the Outer Continental Shelf Lands Act (43 U.S.C. 1333), and

ORDERED, ADJUDGED and DECREED that Home Indemnity Company shall have and recover out of such damages as are awarded to the several plaintiffs in these causes the amounts of its several liens for compensation paid and medical expenses incurred, under provisions of the Longshoremen's and Harborworkers' Compensation Act, because of such deaths and injuries, and

ORDERED, ADJUDGED and DECREED that Chambers & Kennedy shall have and be entitled to full indemnity from Drilling Engineering, Inc., for all amounts it shall be required to pay in damages for the deaths of Eugene Meaux and Franklin J. Credeur and for the injuries to Roy Melancon and Leo Meaux.

ORDERED, ADJUDGED and DECREED that all other relief prayed for in the said captioned causes is expressly denied.

It is further ORDERED that the said captioned causes are hereby remanded to the United States District Court for the Western District of Louisiana, Lafayette Division, for further hearing on the issues of damages.

DONE at Houston, Texas, on this the 18th day of April, 1972.

/s/ JOHN V. SINGLETON, JR.
United States District Judge

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 70-H-1171

WEBSTER BARNWELL ARMSTRONG, III, ET AL
v.
CHAMBERS & KENNEDY, ET AL

CIVIL ACTION NO. 70-H-713

CHAMBERS & KENNEDY
v.
DRILLING ENGINEERING, INC.

CIVIL ACTION NO. 71-H-1348

HYDROTECH SERVICES, INC.
v.
W. D. KENNEDY, ET AL

GALVESTON DIVISION

CIVIL ACTION NO. 71-G-3
71-H-567

LUCILLE MONK, ET AL
v.
CHAMBERS & KENNEDY, ET AL

CIVIL ACTION NO. 70-G-113
71-H-755

IN THE MATTER OF THE
COMPLAINT OF DEARBORN MARINE SERVICE
INC., C-W-D, INC., THOROUGBRED MARINE
SERVICES INC. and FREEPORT OPERATORS, INC.
for exoneration from or Limitation of Liability of the Oil
Screw "CARRYBACK"

FINAL JUDGMENT

The above-captioned causes, and the interventions therein, were consolidated for trial in this court, and after hearing the evidence and receiving the briefs and arguments of counsel, a Memorandum and Order was filed by the court on March 7, 1972, which constitutes the Findings of Fact and Conclusions of Law on all issues of liability, and is made a part of this judgment.

In separate hearings on the issues of damages, the court further found and determined as follows:

The damages resulting by reason of the death of Webster Barnwell Armstrong, Jr., including damages for his conscious pain and suffering, were in the total sum of One Hundred Thousand Dollars ($100,000). The reduction by 25% for his contributory negligence leaves the net amount of those damages to be Seventy-five Thousand Dollars ($75,000). The division of these damages has been established by the approval of awards to the heirs and dependents of Webster Barnwell Armstrong, Jr., in a pretrial settlement.

The damages resulting by reason of the death of William A. Love were in the total sum of Two Hundred Thousand Dollars ($200,000). The division of these damages has been established by the approval of awards to the heirs and dependents of William A. Love in a pretrial settlement.

The damages resulting by reason of the death of Francis Andrew Cassel were in the total sum of One Hundred Thousand Dollars ($100,000). The division of these damages has been established by the approval of awards to the heirs and dependents of Francis Andrew Cassel in a pretrial settlement.

The damages resulting by reason of the death of J. B. Gaspard were, by stipulation of counsel, in the total sum of One Hundred Seventy-nine Thousand Eight Hundred Sixty-two and 50/100 Dollars ($179,862.50). The Home Indemnity Company has a right of subrogation against this recovery in the amount of $4,862.50, plus any additional amounts paid by it after January 11, 1972, for compensation paid under the Longshoremen's and Harborworkers' Act; $25,000 is to be paid into the registry of the court for the use and benefit of Leonard James Gaspard, minor son of the decedent; and the remainder of the recovery is awarded to Mary V. Gaspard.

The damages resulting by reason of the injuries to Ronald Breaux were, by stipulation of counsel, in the total sum of Eighteen Thousand Four Hundred Thirty-three Dollars ($18,433). The Home Indemnity Company has a right of subrogation against this recovery in the amount of $3,433.50, plus any additional amounts paid by it after January 11, 1972, for compensation and medical expense paid under the Longshoremen's and Harborworkers' Compensation Act.

The damages resulting by reason of the death of Wiliam C. Monk, including damages for his conscious pain and suffering, were in the total sum of Four Hundred Eight Thousand One Hundred Fifty-eight and 67/100 Dollars ($408,158.67). The reduction by 25% for his contributory negligence leaves the net amount of those damages to be Three Hundred Six Thousand One Hundred Nineteen Dollars ($306,119). The Hartford Accident Indemnity Company has a right of subrogation against this recovery in the amount of $4,530, plus any additional amounts paid by it after July 15, 1971, for compensation paid under the Longshoremen's and Harbor-

workers' Compensation Act; payments shall be made into the registry of the court for the use and benefit of the minor children of this decedent as follows: Douglas Brian Monk, $20,000; Sandra K. Monk, $15,000; Richard W. Monk, $20,000; and Elizabeth Lorene Monk, $20,000; and the remainder of the recovery is awarded to Lucille Monk, individually and as personal representative of the Estate of William C. Monk.

Damages resulting from the loss of or damage to property and expenses incidental thereto, were as follows:

Chambers & Kennedy	$285,000.00
Hydrotech Services	$ 4,789.93
Black Equipment Company	$ 31,472.62

Thoroughbred Marine Services, Inc., and Dearborn Marine Services, Inc., for the damage to the M/V CARRYBACK, $129,500, to be reduced by 25% for contributory negligence to the net amount of $97,125.

Dearborn Marine Services, Inc., is further entitled to a contractual recovery for charter hire in the further amount of $10,738.82 for the services of M/V CARRYBACK and M/V PECTON.

It is therefore,

ORDERED, ADJUDGED and DECREED that as Chambers & Kennedy, Drilling Engineering, Inc., Chapman Contracting Service Company, Inc., and the Dearborn Group (Dearborn Marine Services, Thoroughbred Marine Services, Inc., C-W-D, Inc., and Freeport Operations, Inc.) are liable for 25% of the damages awarded

for the death of Armstrong, the assignees of that cause of action, Chambers & Kennedy and Drilling Engineering, Inc., jointly, shall have and recover from Chapman Contracting Service Company, Inc., the sum of $18,750 as its one-fourth of those damages, and from the Dearborn Group the sum of $18,750, representing its one-fourth share of those damages. And it is further ORDERED, ADJUDGED and DECREED that the Dearborn Group shall have and be entitled to indemnity from Chapman Contracting Service Company, Inc., for the amount of $6,250 adjudged as Chapman's portion of the indemnity due to Dearborn, Drilling Engineering, Inc., will indemnify Dearborn in the amount of $6,250 for Armstrong's damages, and C & K will indemnify Dearborn in the amount of $6,250; and Chambers & Kennedy shall have and be entitled to recover from Drilling Engineering, Inc., the sum of $25,000, representing Drilling Engineering, Inc.'s obligation to indemnify Chambers & Kennedy for its share of the damages for the death of Captain Armstrong. It is, further,

ORDERED, ADJUDGED and DECREED that as Chambers & Kennedy, Drilling Engineering, Inc., Chapman Contracting Service Company, Inc., and the Dearborn Group (Dearborn Marine Services, Thoroughbred Marine Services, Inc., C-W-D, Inc., and Freeport Operators, Inc.) are each liable for 25% of the damages awarded for the deaths of Love and Cassel, the assignees of those causes of action, Chambers & Kennedy and Drilling Engineering, Inc., jointly, shall have and recover from Chapman Contracting Service Company, Inc., the sum of $75,000 as its one-fourth of those damages, and from the Dearborn Group the sum of $75,000 as its one-fourth of those damages. And it is further,

ORDERED, ADJUDGED and DECREED that Chambers & Kennedy have and recover of and from Drilling Engineering, Inc., the sum of $75,000, representing Drilling Engineering, Inc.'s obligation to indemnify Chambers & Kennedy for its one-fourth share of the damages for the deaths of Love and Cassel; and it is, further,

ORDERED, ADJUDGED and DECREED that Mary V. Gaspard, individually and as personal representative of the Estate of J. B. Gaspard, and as next friend of Leonard James Gaspard, a minor, shall have and recover from Chambers & Kennedy and Drilling Engineering, Inc., jointly and severally, as damages for the death of J. B. Gaspard, the sum of $179,862.50, out of which Home Indemnity Company shall have and be entitled to recover the amount of its subrogation as before stated, and $25,000 shall be paid into the registry of this Court for the use and benefit of the minor, Leonard James Gaspard. And it is, further, ORDERED, ADJUDGED and DECREED that Chambers & Kennedy shall have and be entitled to full indemnity from Drilling Engineering, Inc., for all amounts it may be required to pay because of these damages awarded for the death of J. B. Gaspard. It is, further,

ORDERED, ADJUDGED and DECREED that Ronald Breaux shall have and recover from Chambers & Kennedy and Drilling Engineering, Inc., jointly and severally, the amount of $18,433 as damages for his personal injuries, out of which Home Indemnity Company shall have and be entitled to recover the amount of its subrogation as before stated. And it is, further, ORDERED, ADJUDGED and DECREED that Chambers & Kennedy shall have and be entitled to full indemnity from Drilling Engineering, Inc., for all amounts it may be required to pay be-

cause of these damages awarded Ronald Breaux. It is, further,

ORDERED, ADJUDGED and DECREED that Lucille Monk, individually and as personal representative of the Estate of William C. Monk, Deceased, and as next friend of the minors, Douglas Brian Monk, Sandra Kay Monk, Richard William Monk, and Elizabeth Lorene Monk, shall have and recover from Chambers & Kennedy, Chapman Contracting Service Company, Inc., and the Dearborn Group, jointly and severally, as damages for the death of William C. Monk, the sum of $306,119, out of which Hartford Accident Indemnity Company shall have and be entitled to recover the amount of its subrogation as before stated, and payments shall be made into the registry of the court for the use and benefit of Douglas Brian Monk, in the amount of $20,000, of Sandra K. Monk in the amount of $15,000, of Richard W. Monk in the amount of $20,000, and of Elizabeth Lorene Monk in the amount of $20,000. And it is, further, ORDERED, ADJUDGED and DECREED that Chambers & Kennedy shall have and be entitled to full indemnity from Drilling Engineering, Inc., for all amounts it may be required to pay because of these damages awarded for the death of William C. Monk, and Drilling Engineering, Inc., shall have and be entitled to full indemnity from the Dearborn Group for all amounts it may be required to pay to fulfill its said obligation to indemnify Chambers & Kennedy for these damages awarded for the death of William C. Monk. It is, further,

ORDERED, ADJUDGED and DECREED that Chambers & Kennedy shall have and recover from Drilling Engineering, Inc., the sum of $169,650 as indemnity for the amounts paid by Chambers & Kennedy for settlement

of the claims arising from the deaths of Shelton Nunez and Doris Campbell and of the personal injury claims of Russel Bertrand, Wayne Clark, Richard Benoit, Sr., Donald Vincent, John A. Bertrand, Kenneth W. Vandenstein, Nelson Hanks, Doyle and Wilfred Woods, Lawrence Theriot and Lawrence Bertrand. And it is, further, ORDERED, ADJUDGED and DECREED that Home Indemnity Company shall have and recover from Chambers & Kennedy and Drilling Engineering, Inc., jointly and severally, the sum of $4,900 as its right of subrogation against damages paid for the death of Shelton Nunez, and the sum of $5,250 as its right of subrogation against damages paid for the death of Doris Campbell, under provisions of the Longshoremen's and Harborworkers' Compensation Act, and that Chambers & Kennedy shall have and be entitled to indemnity from Drilling Engineering, Inc., for any amounts it may be required to pay Home Indemnity Company on this account. It is, further,

ORDERED, ADJUDGED and DECREED, pursuant to agreement between the parties and stipulation before trial that Chapman Contracting Service Company, Inc., would pay the total sum of $100,000 for the full and final satisfaction of all liability it might have to any parties for property damage, that Chambers & Kennedy, the Dearborn Group, Black Equipment Company and Hydrotech Services jointly do have and recover from Chapman Contracting Service Company, Inc., for their property damage claims the sum of $100,000, which shall be divided as follows: Chambers & Kennedy to receive $63,230, Dearborn Group to receive $28,720, Black Equipment Company to receive $6,990, and Hydrotech Services to receive $1,060. It is further,

ORDERED, ADJUDGED and DECREED that Chambers & Kennedy shall have and recover from Drilling Engineering, Inc., for its property damages, the sum of $285,000, less any amount received by Chambers & Kennedy out of the recovery from Chapman Contracting Service Company, Inc., for these damages. It is, further,

ORDERED, ADJUDGED and DECREED that Hydrotech Services shall have and recover from Chambers & Kennedy and Drilling Engineering, Inc., jointly and severally, for its property damage, the sum of $4,789.93, less any amount received by Hydrotech Services from Chapman Contracting Service Company, Inc., for these damages. And it is further, ORDERED, ADJUDGED and DECREED that Chambers & Kennedy shall have and be entitled to full indemnity from Drilling Engineering, Inc., for all amounts which it shall have been required to pay to Hydrotech Services for these damages. It is, further,

ORDERED, ADJUDGED and DECREED that Black Equipment Company shall have and recover from Chambers & Kennedy and Drilling Engineering, Inc., jointly and severally, for its property damage the sum of $31,-472,62, less any amount received by Black Equipment Company from Chapman Contracting Service Company, Inc., for these damages. And it is, further, ORDERED, ADJUDGED and DECREED that Chambers & Kennedy shall have and be entitled to full indemnity from Drilling Engineering, Inc., for all amounts which it shall have been required to pay to Black Equipment Company for these damages. It is further,

ORDERED, ADJUDGED and DECREED that the Dearborn Group, as heretofore designated, shall have and recover from Chambers & Kennedy and Drilling Engineering, Inc., jointly and severally, for its property damages, the sum of $97,125, less any amount received by the Dearborn Group out of the recovery from Chapman Contracting Service Company, Inc., for these damages. And it is, further, ORDERED, ADJUDGED and DECREED that Chambers & Kennedy shall have and be entitled to full indemnity from Drilling Engineering, Inc., for all amounts which it shall have been required to pay to the Dearborn Group for these damages. It is further, ORDERED, ADJUDGED and DECREED that Chapman Contracting Service Company, Inc., recover from Chambers & Kennedy the amount of $7,313.25 for services supplied to the time of the casualty. It is, further,

ORDERED, ADJUDGED and DECREED that Dearborn Marine Services, Inc., shall have and recover from Chambers & Kennedy the sum of $10,738.82 for the service of the M/V CARRYBACK and the M/V PECTON. It is, further,

ORDERED, ADJUDGED and DECREED that the petition of Dearborn Marine Service, Inc., C-W-D, Inc., and Thoroughbred Marine Services, Inc., for limitation of liability is denied. It is, further,

ORDERED, ADJUDGED and DECREED that all other relief prayed for in the captioned cases and not granted herein is expressly denied. A separate and interlocutory judgment is being entered as to other cases tried contemporaneously on the issue of liability. It is, further,

ORDERED, ADJUDGED and DECREED that Mr. Edward Murr is awarded a fee of $2,500 for his services as attorney ad litem for the minor plaintiff children of

Armstrong, Love, Cassel, Gaspard and Monk, which is taxed as costs of court to be paid equally by Chambers & Kennedy, Drilling Engineering, Inc., Chapman Contracting Service Company, Inc., and the Dearborn Group. It is, further,

ORDERED, ADJUDGED and DECREED that no attorney's fees shall be taken from the payments directed to be made into the registry of this court for the use and benefit of the minor plaintiffs, and these deposits shall be retained by the clerk subject to the further orders of the court. It is, further,

ORDERED, ADJUDGED and DECREED that excepting as otherwise expressly provided all parties shall bear their own costs of court. And it is, further,

ORDERED, ADJUDGED and DECREED that all amounts awarded by this judgment shall bear interest at the rate of six (6) per cent per annum from the date of this judgment until paid.

DONE at Houston, Texas, on this the 18th day of April, 1972.

/s/ JOHN V. SINGLETON, JR.
United States District Judge

APPENDIX B

In the Matter of the Complaint of DEARBORN MARINE SERVICE, INC., et al., for Exoneration from or Limitation of Liability of the OIL SCREW CARRYBACK
Webster Barnwell ARMSTRONG, III Individually, Etc., et al., Plaintiffs-Appellees,
v.
CHAMBERS & KENNEDY et al.,
Defendants-Appellees-Appellants

Esther M. LOVE, Intervenor-Appellant-Appellee.

No. 72-2704.

United States Court of Appeals,
Fifth Circuit.

Aug. 22, 1974.

Consolidated suits arising out of an offshore oil platform explosion and fire which extended to a vessel moored to the platform. The United States District Court for the Southern District of Texas, John V. Singleton, Jr., J., 340 F.Supp. 1220, entered judgments against the platform owner, platform operator, vessel owner, and supplier of labor to the platform which was being refurbished at the time of the accident, and appeals were taken. The Court of Appeals, Godbold, Circuit Judge, held, inter alia, that (1) the wrongful death action brought against oil platform owner and labor supplier by estate of platform operator's supervisor, who died when the platform fire enveloped nearby vessel on which the supervisor was doing office work, was governed by the land law of Texas, meaning that the Texas doctrine of contributory negligence barred recovery by the supervisor's heirs; however,

the estate's claim against the vessel owner was within admiralty jurisdiction, (2) owner of the vessel breached a legal duty owing to the supervisor where the vessel skipper negligently moored his ship with a 75-foot rope to the oil platform's leeward side, in disregard of the hazardous proximity of the ship to potential fires and possible explosions stemming from welding work being done on the platform, and (3) statute imposing manning and certification requirements on vessels of above 15 tons "carrying passengers for hire" is not limited to public conveyances of passengers.

Affirmed in part, reversed in part, and remanded with directions.

Appeals from the United States District Court for the Southern District of Texas.

Before AINSWORTH, GODBOLD and INGRAHAM, Circuit Judges.

GODBOLD, Circuit Judge:

This consolidated litigation arises out of an offshore oil platform explosion that occurred May 28, 1970, over the outer Continental Shelf and caused extensive property damage and loss of human life on the platform and on a nearby vessel. The normal complexities engendered by such holocaust are multiplied by the part-platform, part-admiralty factual context which necessitates meshing together the law of admiralty and the state law made the surrogate law of the platform by Rodrigue v. Aetna Cas. & Surety Co., 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360 (1969).

The site of the explosion was an unmanned oil collection and storage platform located in the Gulf of Mexico twelve miles off the coast of Galveston, Texas and permanently affixed to the subsoil of the outer Continental Shelf. It was owned by Chambers and Kennedy (C & K), was maintained and operated by Drilling Engineering, Inc. (DEI) on behalf of C & K under a well-servicing contract, and it consisted primarily of five oil storage tanks with a capacity of 1,000 barrels each and one smaller tank. In March 1970, an agent of the Geological Survey[1] wrote to C & K requesting that it bring its platform into compliance with various safety and pollution regulations.[2] At this time the platform was in a generally deteriorated condition, some of the lateral braces were severely rusted, many of the boards were rotten or oil soaked, it was in need of painting, and in places the floor of the platform was warped. On April 10 C & K shut down production from the satellite wells whose production had been pumped into the tanks for storage, and the next day a barge transported to shore all oil then in the tanks.

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1. The Secretary of the Interior has charged the Director of the Geological Survey with administering certain regulations relating to conservation of natural resources on the outer Continental Shelf. The pertinent regulations are at 30 C.F.R. §§ 250.1-250.100.

2. One regulation mentioned was 30 C.F.R. § 250.46, which provides:

> "The lessee shall perform all operations in a safe and workmanlike manner and shall maintain equipment for the protection of the lease and its improvements, for the health and safety of all persons, and for the preservation and conservation of the property and the environment. The lessee shall take all necessary precautions to prevent and shall immediately remove any hazardous oil and gas accumulations or other health, safety or fire hazards."

Pursuant to its well-servicing contract with C & K, DEI began making the required alterations and repairs. DEI furnished a supervisor for the job and contracted with a labor supply firm to furnish pipefitters, welders, painters, and roustbouts. The work consisted of painting, sandblasting, and some "hot work," such as cutting with acetylene torches and welding. The hot work was generally done at an elevated heliport or at the perimeter of the platform away from the tanks. Since the platform was unmanned it was necessary that there be daily transportation from shore to platform and back to shore for those engaged in and supervising the work. Also, of course, various materials, supplies and equipment had to be transported to and from shore. Commencing May 3 or 4 and pursuant to an oral arrangement between DEI and Dearborn, the nature and consequences of which we will discuss later, the vessel serving these purposes was the CARRYBACK, an all steel, eighty-five foot vessel of 136 gross tons, powered by 670 h. p. twin diesels, having fifteen seats for passengers, and owned by Dearborn.[3] Each day for the period after it arrived from shore and until it returned to shore the CARRYBACK remained in the vicinity of the platform, acting as a service and standby vessel. She carried a galley, cook and food and served meals to platform workmen as desired. She had toilets aboard—there were none on the platform— and workers could come aboard her to use them. The DEI supervisor, Monk, came aboard her to do office work where he could be away from the wind and noise of the platform and in air-conditioned

3. Initially, for a few days, the vessel serving these purposes under the DEI-Dearborn oral arrangement was Dearborn's M/V PICTEN, a somewhat smaller boat. The CARRYBACK was substituted because a larger and more maneuverable boat was needed.

surroundings. He was permitted to use her ship to shore radio with the permission of the captain. By May 25, labor for the alteration and repair work was being supplied by Chapman Contracting Service (Chapman).

Between April 10, when C & K had shut down production from the satellite wells, and May 25, and for reasons not disclosed in the record, the tanks collected about 1,100 barrels of oil. DEI's jobsite supervisors, Rick Chapman of Chapman Contracting, and other executives of C & K and DEI knew that the tanks contained oil.

On May 27 representatives of the Geological Survey advised Monk, DEI's supervisor at the platform, that to comply with antipollution guidelines he would have to remove a valve from one of the equalizing lines between tanks. This was the first job to require breaking a connection leading directly to the oil storage tanks. Monk discussed the procedure with Overly, Chapman's supervisor at the platform, and on the morning of May 28 he discussed it with Rick Chapman, who had flown to the platform by helicopter to survey the work. The District Court[4] reconstructed the attempts of May 28 to remove the valve:

> . . . Mr. Overly instructed Mr. Scanlan, a pusher for Chapman, to remove the valve from the equalizer line. Mr. Scanlan, along with the two other Chapman employees, began working on the equalizer line and broke the union and cut the pipe with a pipe cutter. They took out the valve leaving a part of the equalizer line protruding in place. They then proceeded to take the valve and the other part of the equalizer line to the south end of the plat-

4. Its opinion is reported as Armstrong v. Chambers & Kennedy, 340 F.Supp. 1220 (S.D. Tex. 1972).

form beneath the heliport and there fabricated, or threaded a new piece of pipe called a nipple to put back in the equalizer line and reconnect it. Mr. Scanlan then went back to the equalizer line and screwed the new nipple in place. This procedure left two pieces of pipe to be connected together. Mr. Scanlan talked to Mr. Monk and told Mr. Monk that he was going to connect these two pieces by welding them. The facts do not reflect where this conversation took place—whether on the platform or on the *Carryback*. The facts do not indicate whether or not Mr. Monk told Mr. Scanlan to weld the line *in place* [or on the edge of the platform away from the tanks], or whether Mr. Scanlan told Mr. Monk he was going to weld the line in place. But the facts do reflect that at some time before the explosion Mr. Scanlan told Mr. Monk he was going to weld the line.

> Mr. Scanlan told Mr. Gaspard, a Chapman welder, and Mr. Breaux, a welder's helper, to weld together the two pieces of pipe that now constituted the equalizer line . . . . Mr. Gaspard began the welding and at the time that he struck an arc, there was an explosion. Burning oil then rapidly spread fire across the platform, resulting in [death and] injuries and damage there.

340 F. Supp. at 1231-1232 (emphasis in original).

The CARRYBACK was just downwind of the explosion, tied to the platform on a seventy-five foot line with her stern toward the platform. With the explosion a flaming ball of oil rose above the platform and was carried by a wind of about eight knots to a point directly over the CARRYBACK, where it descended "as if it were an exploding bomb" and "instantaneously

wrapped [her] in consuming fire". In only minutes all aboard perished—Captain Armstrong, the master; crew members Love and Cassel; and Monk, DEI's supervisor. The vessel was reduced to scrap metal. Of approximately twenty workers on the platform five were killed.

Dearborn filed a petition for limitation of or exoneration from liability in the United States District Court for the Southern District of Texas, Galveston Division, and answers and claims in this proceeding were filed by DEI, C & K, the heirs of Monk, Cassel, Love, and Armstrong, and by several platform workers and heirs of platform workers. In Texas state court Monk's estate sued C & K and Freeport Operators (Dearborn's subsidiary) who removed the cause to the federal District Court in Galveston. Suits in the same District Court, Houston Division, were filed by C & K against DEI and Chapman for damages to its platform, and by the heirs of Armstrong against C & K, DEI, Chapman, and Freeport Operators. The limitation proceedings in the Galveston Division were subsequently consolidated with the Houston suits for trial in the Houston Division, and it is from judgment entered in these consolidated proceedings after a trial without a jury that this appeal is taken. The posture of the parties under the judgment (excluding awards of indemnity) can be summarized this way, insofar as pertinent to this appeal.

"Platform Defendants"

C & K: Owner of the platform. Violated safety regulations.

DEI: Operator of the platform. Violated safety regulations.

Chapman: Labor supplier. Negligent.

Other Defendant

Dearborn: Owner of the CARRYBACK. Negligence and unseaworthiness.

Claims[5]

Love and Cassel: Crew members killed aboard the CARRYBACK.

Captain Armstrong: Master, killed aboard the CARRYBACK.

Monk: DEI supervisor, killed aboard the CARRYBACK.

Property damage: Loss of CARRYBACK.

Liability

C & K, Chapman, DEI and Dearborn:
Liable for deaths of Love and Cassel (no contributory fault by Love or Cassel). Liable for death of Captain Armstrong (25% contributory fault).
C & K, DEI and Chapman:
Liable for loss of CARRYBACK (25% contributory fault by vessel).
C & K, Chapman and Dearborn:
Liable for death of Monk (25% contributory fault).[6]

5. Claims of persons injured or killed on the platform, or in the sea after jumping from the platform, have been either settled or reduced to judgment and satisfied and are not before us. Nor is the matter of damage to the platform before us.

6. Monk's heirs did not sue his employer DEI.

The District Court held C & K had breached a nondelegable duty imposed by regulations promulgated under the Outer Continental Shelf Lands Act to maintain a safe offshore platform.[7] DEI was found negligent in its supervision of platform operations. DEI employees specifically mentioned were Monk, the platform supervisor at the time of explosion, and Chenier, Monk's superior, neither of whom "adequately warn[ed] Chapman and its employees of the dangers incident to removal of the equalizer line."[8] Chapman was held negligent because of Rick Chapman's failure to warn his employees of the presence of oil in the tanks and for inadequate supervision of the

7. The District Court cited 30 C.F.R. §§ 250.45 and 250.46. Section 250.46 is set out in note 2 *supra*. Section 250.45 provides:

> "In the conduct of all its operations, the lessee shall take all steps necessary to prevent accidents and fires, and the lessee shall immediately notify the supervisor of all serious accidents and all fires on the lease, and shall submit in writing a full report thereon within 10 days. The lessee shall notify the supervisor within 24 hours of any other unusual condition, problem, or malfunction."

The District Court further reasoned: "Even if this nondelegable duty were not set by statute, the court would have to impose it. . . . [T]he duty placed here upon the oil lease is similar to the traditional tort duty of one using an ultrahazardous substance." 340 F.Supp. at 1234.

8. The District Court listed four specific acts of negligence by DEI:

> "(1) [failure] to suspend all burning and welding operations while the equalizer line was open as a result of the removal of a section of the line;
> "(2) [failure] to seal this opening until that section of the line had been replaced;
> "(3) [failure] to carefully supervise the removal and reinstallation of the line to see that no welding or other work that could possibly produce an ignition would be undertaken in the performance of this operation; and
> "(4) [failure] to post warning signs on the tanks with instructions that no welding or hot work be done in this area."

340 F.Supp. at 1236.

welding by Scanlan, Chapman's pusher.[9] The District Court found that these breaches of duty by Chapman, C & K, and DEI combined with the faults of Dearborn to proximately cause the deaths, injuries, and property damage in issue.

Dearborn was found to have breached its legal responsibilities in several respects. The District Court found that her master was negligent in mooring her in an unreasonably hazardous location. It found the vessel unseaworthy for being moored as she was, for failure to comply with 46 U.S.C. § 404, which imposes certain manning and inspection requirements on vessels "carrying passengers for hire," and for being manned by an incompetent crew. These acts of negligence and conditions of unseaworthiness, the District Court found combined with the acts of the platform defendants to proximately cause the deaths of those aboard the CARRYBACK and the loss of the vessel itself.

Chapman contests the District Court's rulings on its negligence. Dearborn contests the rulings on its negligence and unseaworthiness. C & K and DEI do not contest findings of fault on their part but contest certain legal consequences thereof.

[1] Monk's heirs sought to maintain their suit against Dearborn for negligence and unseaworthiness under the general maritime law and the Death on the High Seas Act, 46 U.S.C. §§ 761-768. Representatives of the deceased crew members added to these contentions a claim

9. The workers could have easily verified the presence of oil by visual inspection through a hatch at the top of each tank or by use of a device called a "sniffer." Testimony indicated that hot work on the platform should have been postponed until the oil was removed from the tanks and their interiors scrubbed with salt water.

for negligence under the Jones Act, 46 U.S.C. § 688.[10] All four estates alleged that DOHSA and the general maritime law provide a federal cause of action against the platform defendants—C & K, DEI, and Chapman[11]—but, as we will explore later, there is a question whether these claims fall within § 1333 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 et seq., which prescribes the applicable law for the subsoil of the outer Continental Shelf and for artificial islands permanently affixed thereto. For the present we need only observe that the death claims against all defendants were properly in federal district court under either the Jones Act or DOHSA or fell within the Lands Act.[12]

There are two main issues—whether land law or admiralty law covers the claim of Monk against Dearborn, and whether manning and inspection requirements of federal statutes and regulations apply to the CARRYBACK. Determination of the second of these bears on the findings that Dearborn was negligent and the CARRYBACK unseaworthy, which in turn may affect, at least, limitation of liability, relative fault between the defendants, and the extent of Monk's comparative fault. Un-

10. Seamen have alternative remedies against their employers under the Jones Act for negligence and DOHSA for unseaworthiness. Moragne v. States Marine Lines, Inc., 398 U.S. 375, 396 n. 12, 90 S.Ct. 1772, 1785 n. 12, 26 L.Ed.2d 339, 354 n. 12 (1970); Doyle v. Albatross Tanker Corp., 367 F.2d 465 (C.A. 2 1966).

11. Except, as already pointed out, Monk's heirs did not sue his employer, DEI.

12. The District Court found that general maritime law applied to the death actions, citing Moragne v. State Marine Lines, Inc., 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970), which concerned a death in state waters. Whether *Moragne* applies on the high seas is an issue not yet decided by this court and not briefed by the parties, and we do not consider it.

tangling these skeins and setting out various alternatives would require a catalogue of instructions to the District Court on remand that would be neither useful nor practical. We therefore decide the issues presented as best we can, vacate the judgment of the District Court, and remand for further proceedings.

1. Consolidation

[2, 3] A threshold question is whether the District Court correctly consolidated Dearborn's limitation petition, filed pursuant to 46 U.S.C. § 185, with the Armstrong death action for trial in Houston. District courts have broad discretion under Fed. R. Civ. P. 42(a) to consolidate causes pending in the same district. *See generally* 9 Wright & Miller, Federal Practice & Procedure § 2384, at 272 (1971). In this case there was no jurisdictional impediment to consolidation because both the Armstrong suit and the limitation proceeding independently invoked federal jurisdiction.[13] Since the actions presented common issues of law and fact, consolidation saved the parties from wasteful relitigation in disparate forums, avoided duplication of judicial effort, and did not prejudice Dearborn's right to prove entitlement to limitation. The District Court did not abuse its discretion in ordering consolidation.[14]

13. Jurisdiction over Armstrong's suit was under the Death on the High Seas Act, 46 U.S.C. §§ 761-768, and the Jones Act, 46 U.S.C. § 688. Dearborn's limitation petition was properly in federal district court under 46 U.S.C. § 185.

14. With the unification of admiralty and civil procedure, suits in admiralty have even been consolidated with civil actions at law when the effect was to force issues in the admiralty action to be tried to a jury. See Blake v. Farrell Lines, Inc., 417 F.2d 264 (C.A. 3, 1969); 5 Moore, Federal Practice ¶ 42.02, at 42-11 to 42-13 (2d ed. 1971) (main volume and cumulative supplement).

2. The governing law and Monk's contributory negligence.

The District Court found Dearborn, Chapman, and C & K jointly and severally liable for the death of Monk, DEI's supervisor. Monk was basically a platform worker, but he spent part of his time aboard the CARRYBACK, completing his work reports and using the ship's shortwave radio to communicate with DEI's shoreside office. He was on the CARRYBACK when the explosion occurred. The court found that Monk's inadequate supervision of platform operations contributed to his death to the extent of 25%. The District Court recognized that under *Rodrigue Texas* law applied to platform-based deaths and injuries, but reasoned that because Monk died at sea the claim for his death, as against all defendants, was within maritime jurisdiction. Accordingly it applied admiralty's beneficent doctrine of comparative negligence to permit recovery by the Monk heirs against Dearborn, Chapman and C & K, reduced by 25%.

[4] Under Texas law contributory negligence is a bar to recovery in a negligence action. "The doctrine of comparative negligence, which apportions liability between the parties according to the relative degree of their negligence, does not exist in Texas, except by virtue of statute in actions between certain employers and their employees." 40 Tex. Jur. 2d Negligence § 97, at 602-03 (1962) (footnotes omitted).[15]

15. Texas courts have applied the comparative negligence doctrine to suits for death in state territorial water of *Sieracki* seamen. See Vassallo v. Nederl-Amerik Stoomv Maats Holland, 162 Tex. 52, 344 S.W.2d 421 (1961). *Vassallo* was a suit within maritime jurisdiction in which the Texas death statutes were borrowed to provide a vehicle for recovery, but the Texas court chose to apply substantive maritime principles. This borrowing was necessitated by The Harrisburg, 119 U.S. 199, 7 S.Ct. 140, 30 L.Ed. 358 (1886) [overruled

[5] Chapman and C & K—the two platform defendants held liable on the Monk claim—vigorously urge that as against them Texas law controlled so that Monk's contributory negligence barred the claim for his death. For reasons discussed below we conclude that the land law of Texas, the surrogate law for the platform, does control as between these parties with the result that the Monk claim against C & K and Chapman is barred.[16]

The death claim for Monk, who perished about seventy-five feet downwind of the platform, presents a jurisdictional conflict between the Death on the High Seas Act and the Outer Continental Shelf Lands Act. DOHSA provides in pertinent part: "Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, . . . the personal representative . . . may maintain a suit for damages . . . in admiralty . . . ." 46 U.S.C. § 761.[17] The Lands Act extends the

in Moragne v. States Marine Lines, Inc., 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970)], which held that general maritime law did not permit recovery for wrongful death. For suits to which substantive principles of Texas law are applicable, however, contributory negligence has traditionally barred recovery.

Texas recently enacted a modified comparative negligence statute. Tex. Laws 1973, ch. 28, § 1, at 41. It applies only to causes of action arising after September 1, 1973.

16. We reject as meritless, without any necessity for discussion, the argument of the Monk heirs that C & K and Chapman did not adequately raise contributory negligence as an issue, and that if the District Court erred in ruling on the effect of Monk's contributory negligence it was enticed into error by C & K and Chapman, who may not complain of it on appeal.

17. DOHSA has been construed to confer admiralty jurisdiction over claims arising out of airplane crashes on the high seas though the negligence alleged to have caused the crash occurred on land. See Stiles v. National Airlines, Inc., 161 F.Supp. 125 (E.D. La. 1958), aff'd, 268 F.2d 400 (C.A. 5), cert. denied, 361 U.S. 885, 80 S.Ct. 157, 4 L.Ed.2d 121 (1959); Lindsay v. McDonnell Douglas Aircraft Corp., 460 F.2d 631 (C.A. 8, 1972); Noel v. Airponents, Inc., 169 F.Supp. 348 (D.N.J. 1958). *See generally Annot.*, 66 A.L.R. 2d 1002 (1959).

political jurisdiction of the United States "to the subsoil and seabed of the outer Continental Shelf and to all artificial islands and fixed structures . . . erected thereon," 43 U.S.C. § 1333(a)(1), and then provides in relevant part:

> To the extent that they are applicable and not inconsistent . . . with other Federal laws . . . the civil and criminal laws of each adjacent State as of August 7, 1953 are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf . . . .

Id. at § 1333(a)(2).

In a line of decisions beginning with Pure Oil Co. v. Snipes, 293 F.2d 60 (C.A. 5, 1961), this circuit construed § 1333 of the Lands Act to make federal maritime law, as supplemented by state laws, applicable to injuries occurring on island-platforms on the outer Continental Shelf. See Loffland Bros. Co. v. Roberts, 386 F.2d 540 (C.A. 5, 1967), cert. denied, 389 U.S. 1040, 88 S.Ct. 778, 19 L.Ed.2d 830 (1968); Ocean Drilling & Exp. Co. v. Berry Bros. Oilfield Serv., 377 F.2d 511 (C.A. 5), cert. denied, 389 U.S. 849, 88 S.Ct. 102, 19 L.Ed.2d 118 (1967); Movible Offshore Co. v. Ousley, 346 F.2d 870 (C.A. 5, 1965). In Dore v. Link Belt Co., 391 F.2d 671 (C.A. 5, 1968), and Rodrigue v. Aetna

Cas. & Sur. Co., 395 F.2d 216 (C.A. 5, 1968), we extended the rationale of *Pure Oil* to death claims so as to make them exclusively cognizable in admiralty under the Death on the High Seas Act. In *Rodrigue* plaintiff's decedent was killed when he fell from a derrick to the floor of the platform, and in *Dore* the worker had fallen to his death when the crane on which he was working toppled onto a barge moored below. The Supreme Court granted certiorari in both cases, consolidated them, and ruled that DOHSA did not apply. The Court then reasoned that since state law governed under § 1333 in the absence of inconsistent federal law, the nonapplicability of DOHSA allowed state law to apply as incorporated federal law. The case was accordingly reversed and remanded for further consideration.

The relevance of the *Rodrigue* decision to our case springs as much from its underlying rationale as from its result. The Court reasoned that under traditional jurisdictional principles maritime law is inapplicable to platform-based accidents,[18] but the more fundamental premise was that Congress did not intend by the Lands Act that these island-platforms be within admiralty's jurisdiction.

> Even if the admiralty law would have applied to the deaths occurring in these cases under traditional principles, the legislative history shows that Congress did not intend that result. First, Congress assumed that the admiralty law would not apply unless Congress made it apply, and then Congress decided

18. The thesis for this argument was that the island-platforms were to be viewed as extensions of the subsoil, and that admiralty jurisdiction traditionally had not attached to extensions of land not erected as navigational aids. 395 U.S. at 359-361, 89 S.Ct. at 1839-1840, 23 L.Ed.2d at 366-367.

> not to make it apply. The legislative history of the Lands Act makes it clear that these structures were to be treated as islands or as federal enclaves within a landlocked State, not as vessels.

395 U.S. at 361, 89 S.Ct. at 1840, 23 L.Ed.2d at 367.[19] One indication of Congress' intent to exclude island-platforms from admiralty jurisdiction was said to be the emphasis in the congressional debates and hearings on the close relationship between adjacent states and platform workers, who often commute regularly between land and platform. 395 U.S. at 363, 89 S.Ct. at 1841, 23 L.Ed.2d at 368. The Court also noted the theme underlying the legislative history that exploration and development of underground resources on the continent's submerged shelf lands was substantively a land-related activity and alien to the traditional interests of maritime law. *Id.* at 364-365, 89 S.Ct. at 1841-1842, 23 L.Ed.2d at 369.[20]

19. At least in methodology this court and the Supreme Court found common ground. In Pure Oil Co. v. Snipes, 293 F.2d 60 (C.A. 5, 1961), we had stated:

> "If [state] law is to apply, it is because Congress has specified that this is so.
>
> . . . . .
>
> [W]e are not confronted with the question whether Congress would have the constitutional power to declare as to these offshore activities that for an essentially maritime matter a non-maritime standard is to be followed. At most, we have a question whether Congress may treat an occurrence in this new geographical area as substantially maritime even though on traditional lines an event taking place on a structure fixed permanently to the bed of the water might be regarded as non-maritime."

Id. at 64.

20. The Court quoted the testimony of an admiralty expert given at the congressional hearings that "[M]aritime law in the strict sense has never had to deal with the resources in the ground beneath the sea, and its whole tenor is ill adapted for that purpose." 395 U.S. at 365 n. 12, 89 S.Ct. at 1842 n. 12, 23 L.Ed.2d at 369 n. 12.

These concerns about the close relationships between platform workers and their adjacent states and about the nonmaritime character of platform operations indicate to us that Congress did not intend that application of state law necessarily should cease at the physical boundaries of the platform. The same concerns may be equally applicable to accidents fortuitously consummated in the surrounding sea. While Monk's death occurred on the high seas, there is little to choose between his relationship to the adjacent state and those of his fellow platform workers. He was by all standards a platform worker. The time he spent aboard the CARRYBACK was primarily in pursuit of such platform-related duties as filling out work reports and communicating with his shoreside office. Also, his claim against C & K and Chapman rests on the theory that they performed the renovation project on the platform in an unreasonably unsafe manner, and, as *Rodrigue* teaches, Congress felt that accidents caused by such operations were more significantly tied to the interests of the adjacent state than to the admiralty's interest in maritime commerce.

Post-*Rodrigue* case law in this circuit supports a view that Congress intended by § 1333 to extend the law of the adjacent state to claims such as the one in issue. Twice we have found maritime law inapplicable to claims by platform workers pushed into surrounding seas by platform-based equipment, even though substantial injuries may have been physically caused by the water itself. See Bible v. Chevron Oil Co., 460 F.2d 1218 (C.A. 5), cert. denied, 409 U.S. 984, 93 S.Ct. 325, 35 L.Ed.2d 248 (1972); Bertrand v. Forest Corp., 441 F.2d 809 (C.A. 5), cert. denied, 404 U.S. 863, 92 S.Ct. 106, 30 L.Ed.2d 107 (1971). In *Rodrigue* itself one of the decedents was

killed when he fell onto a barge moored next to the platform. The distinction between the suitors in these cases and one in the position of Monk, fortuitously positioned at sea at the time of explosion, is at best elusive. We might say that in the earlier post-*Rodrigue* cases a tort originating on the platform cast its victims into the sea, whereas in Monk's case the tort travelled for approximately seventy-five feet across the water to find its victim, but it seems illogical to assume that Congress would have grounded the choice between maritime and state law on a distinction so lacking in substance.

[6-10] Other developments in the law of admiralty jurisdiction point toward treating Monk's claim against the platform defendants as under the law of the adjacent state. Historically maritime jurisdiction has been measured by the locality of the wrong[21] with locality defined as where the "substance and consummation of the injury" took place. The Plymouth, 70 U.S. (3 Wall.) 20, 33, 18 L.Ed. 125, 127 (1886).[22] But as the Supreme Court recently noted in Executive Jet Aviation v. Cleveland, 409 U.S. 249, 261, 93 S.Ct. 493, 501, 34 L.Ed.2d 454, 463 (1972), increasingly there have been legislative and

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21. *See generally* discussions in Watz v. Zapata Off-Shore Co., 431 F.2d 100, 109-111 (C.A. 5, 1970); Peytavin v. Government Employees Ins. Co., 453 F.2d 1121 (C.A. 5, 1972); 7A Moore, Federal Practice ¶ .325 [3] (2d ed. 1972); Black, Admiralty Jurisdiction: Critique and Suggestions, 50 Col. L. Rev. 259 (1950).

22. This strict locality test is so mechanical in operation that at times it has made maritime jurisdiction depend on the direction from which plaintiff fell, landward or seaward. *Compare* T. Smith & Son, Inc. v. Taylor, 276 U.S. 179, 48 S.Ct. 228, 72 L.Ed. 520 (1928) [longshoreman knocked from wharf staging into water by sling being lowered from vessel; state law applicable], *with* Minnie v. Port Huron Term. Co., 295 U.S. 647, 55 S.Ct. 884, 79 L.Ed. 1631 (1935) [longshoreman knocked by hoist from vessel onto adjacent wharf; federal law applicable].

judicial rejections of strict locality as the sole test of jurisdiction. A seaman, for example, can recover under the Jones Act for injuries suffered in the course of the ship's services, whether on land or sea. In his case "[a]dmiralty jurisdiction over the suit depends not on the place where the injury is inflicted but on the nature of the service and its relationship to the operation of the vessel plying in navigable waters." O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36, 42-43, 63 S.Ct. 488, 492, 87 L.Ed. 596, 602 (1943). *Accord,* Kelly v. Smith, 485 F.2d 520 (C.A. 5), cert. denied sub nom. Chicot Land Co. v. Kelly, ____U.S.____, 94 S.Ct. 1991, 40 L.Ed.2d 558 (1974); Kimble v. Noble Drilling Corp., 416 F.2d 847 (C.A. 5, 1969), cert. denied, 397 U.S. 918, 90 S.Ct. 924, 25 L.Ed.2d 99 (1970).[23] And in 1948 Congress moved admiralty jurisdiction shoreward with the Extension of Admiralty Act, 46 U.S.C. § 740, which provides that maritime jurisdiction shall include cases of damage "cause by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land." This statute applies to give admiralty jurisdiction over pierside injuries caused by the vessel's hull, gear, or cargo. See Gutierrez v. Waterman S.S. Corp., 373 U.S. 206, 83 S.Ct. 1185, 10 L.Ed. 2d 297 (1963), explained in Victory Carriers, Inc. v. Law, 404 U.S. 202, 209-210, 92 S.Ct. 418, 423-424, 30 L.Ed.2d 383, 390 (1971).

23. A seaman's right to maintenance and cure is similarly unbounded by locality. Gilmore & Black, Law of Admiralty §§ 6-6 to 6-9 (1957). For suits on a contract, maritime relationship, not locality, has always determined jurisdiction. DeLovio v. Boit, 7 F. Cas. pp. 418, 444 (No. 3,776) (CCD Mass. 1815); Kossick v. United Fruit Co., 365 U.S. 731, 81 S.Ct. 886, 6 L.Ed.2d 56 (1961); Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 75 S.Ct. 368, 99 L.Ed. 337 (1955).

Several courts have recently declined to uphold admiralty jurisdiction over accidents consummated in state territorial waters but lacking a significant maritime connection. In Peytavin v. Government Employees Ins. Co., 453 F.2d 1121 (C.A. 5, 1972), plaintiff, while parked on a floating pontoon waiting to board a ferry, was involved in a rearend collision. He sued in admiralty for resulting whiplash and back injuries. The court rejected strict locality as the sole test of jurisdiction because of its failure "to provide any clear guidance," *id.* at 1126, and focused instead on the connection of the claim to traditional maritime activities or interests. Since maritime connection was lacking in the relationship between the parties, in the nature of the alleged negligence (failure to keep an automobile under control and to maintain a proper lookout), and in the nature of injuries (whiplash), the court dismissed the suit. In *Executive Jet* plaintiff's plane had suffered a power loss from ingesting seagulls into its engines on taking off from defendant's airport and finally had settled into Lake Erie just off the end of the runway, where it sank and became a total loss. Plaintiff sued in admiralty for property damages, alleging that defendant negligently failed to keep its runway free of seagulls or to warn of their presence, but the Court dismissed for lack of jurisdiction.

> [T]he mere fact that the alleged wrong "occurs" or is "located" on or over navigable waters—whatever that means in an aviation context—is not itself sufficient to turn an airplane negligence case into a "maritime tort." It is far more consistent with the history and purpose of admiralty to require also that the wrong bear a significant relationship to traditional maritime activity. We hold that unless such a relationship exists, claims arising from air-

> plane accidents are not cognizable in admiralty in the absence of legislation to the contrary.

Id. 409 U.S. at 268, 93 S.Ct. at 504, 34 L.Ed.2d at 467.[24]

[11] The emphasis on maritime connection as a prerequisite to admiralty jurisdiction—typified by the Supreme Court's opinion in *Executive Jet* and by *Peytavin* in this circuit—is an additional reason for holding DOHSA inapplicable to the Monk death claim. Monk was a platform worker. He was aboard the CARRYBACK for the purpose of performing duties directly related to platform operations, the physical cause of his death was the platform explosion, and his cause of action against the platform defendants is based on negligent performance of platform operations. Under the teaching of *Rodrigue* these factors exemplify a more significant connection with the adjacent state than with admiralty.

Re Motor Ship Pacific Carrier, 489 F.2d 152 (C.A. 5, 1974), cert. denied, Union Camp Corp. v. Gypsum Carrier, Inc. ____U.S.____, 94 S.Ct. 2643, 41 L.Ed.2d 235 (1974), is not inconsistent with our conclusion. In that case the tort was the emission from a plant located on the bank of a navigable stream of fumes, smoke and gases which blew across the channel and engulfed a ship under way. The vessel, with visibility lost, collided with a bridge. Emphasizing substantial maritime connections, rejecting a strict locality test, and relying upon *Executive Jet* and our decisions in *Peytavin* and *Kelly*, we held that the ship's

24. Other cases often cited as representing a trend away from the strict locality test are Atlantic Transport Co. v. Imbrovek, 234 U.S. 52, 34 S.Ct. 733, 58 L.Ed. 1208 (1914); Watz v. Zapata Off-shore Co., 431 F.2d 100 (C.A. 5, 1970); Chapman v. City of Grosse Pointe Farms, 385 F.2d 962 (C.A. 6, 1967); McGuire v. City of New York, 192 F.Supp. 866 (S.D.N.Y. 1961).

claim against the plant was within admiralty jurisdiction. As in *Kelly*, where the cause of injury was gunfire from shore, the landbased origin of the wrong consummated on the sea did not avoid admiralty jurisdiction. *Pacific Carrier* would be more nearly comparable to the case before us if the claim asserted against the plant had been that of the plant superintendent, aboard the vessel as neither crewman nor as passenger in the usual sense but using the vessel to perform plant-related duties at the time vision was obscured by smoke and fumes created in part by his landbased lack of care.

We conclude that § 1333(a)(2) of the Lands Act, when read against the background of legislative history outlined in *Rodrigue* and the increasing judicial and legislative dissatisfaction with strict locality as the sole test of jurisdiction, precludes us from treating Monk's claim against C & K and Chapman as a suit in admiralty. Accordingly the Texas doctrine of contributory negligence bars recovery by Monk's heirs from C & K and Chapman.[25]

25. *Rodrigue* must be read against the background of §1333(a)(2), the section that extends state law to the artificial islands and that forms the basis of the *Rodrigue* decision. Section 1333(b) is cast in broader terms:

> "The United States district courts shall have original jurisdiction of cases and controversies arising out of or in connection with any operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing or transporting by pipeline the natural resources, or involving rights to the natural resources . . . ."

An argument could be made that this subsection, read in conjunction with subsection (a)(2), at once prescribes jurisdiction and makes state laws applicable to "cases and controversies arising out of or in connection with any operations conducted on the outer Continental Shelf." Our interpretation of *Rodrigue* rejects this construction. The premise of *Rodrigue* is that DOHSA does not apply to platform-based injuries, and its nonapplicability opens the door

[12-16] Dearborn has not claimed the benefit of the Texas contributory negligence bar, and correctly so. Suits by landsmen injured aboard ship in navigable waters have traditionally been within maritime jurisdiction. Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 79 S.Ct. 406, 3 L.Ed.2d 550 (1959). Moreover, Dearborn's situation is different from that of the platform defendants whose breaches of duty were platform-related, while Dearborn's concurring breaches were admiralty-related. As between platform defendants and Monk, the only nexus with admiralty was Monk's presence aboard the vessel.[26] In this context it is consistent with the rationale of *Rodrigue* and the teachings of *Executive Jet* and *Peytavin* that the surrogate law of the platform controls the controversy. In the context of Monk versus Dearborn, however, the interest of admiralty intervenes because the risks to which Monk was exposed by Dearborn, and Dearborn's breaches thereof, were admiralty-related, concerning the duty of the vessel to those aboard her. Under the former "locality" test for determining admiralty jurisdiction, if Monk were a dock worker who, on like facts and with like consequences, had left the dock and gone aboard the CARRY-

for state laws. The question whether DOHSA applies to injuries occurring on the high seas around the platform, and thus ousts inconsistent state laws, cannot be answered by the "in connection with" test of subsection (b). This much is implicit in Kimble v. Noble Drilling Corp., 416 F.2d 847 (C.A. 5, 1969), cert. denied, 397 U.S. 918, 90 S.Ct. 924, 25 L.Ed.2d 99 (1970), in which we permitted a seaman to sue his employer under the Jones Act for injuries sustained on a stationary platform. His status as seaman, we explained, was sufficient to invoke the jurisdiction of the Jones Act even though his injury was in connection with platform operations.

26. The CARRYBACK's crew members possessed a maritime status and were killed in the performance of distinctively maritime work.

BACK tied up nearby, his claim would have been in admiralty. After *Executive Jet, Peytavin* and *Kelly* the result would be the same, since there would be involved both locality and the relationship to admiralty previously recognized in *Kermarec*. As *Rodrigue* points out, the platform is like a pier. *Rodrigue* did not, by making land law the surrogate law of the platform, give it greater application off the platform in an admiralty-related situation than the land law would have off the pier in like circumstances. The interests vindicated in *Rodrigue* were, first, the status of the platform worker as land-related, and, second, the interest of the state in the process of extracting minerals from the soil and its particular capacity to deal with that subject matter as against admiralty's incapacity. Here there are also present matters which admiralty is particularly adapted to handle and land law is not. Admiralty's jurisdiction over the Monk claim against Dearborn is not ousted.[27]

27. Our analysis has been in jurisdictional terms though the question presented was not whether the District Court had jurisdiction, but whether once having acquired jurisdiction it should apply Texas or maritime law. Choice of law questions raised in a maritime context have traditionally been analyzed in jurisdictional terms, however, because as a general rule "[o]nce admiralty jurisdiction is established, then all of the substantive rules and precepts peculiar to the law of the sea become applicable ." Branch v. Schumann, 445 F.2d 175, 178 (C.A. 5, 1971). *Accord,* Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 628, 79 S.Ct. 406, 408, 3 L.Ed.2d 550, 553 (1959); King v. Alaska S.S. Co., 431 F.2d 994, 996 (C.A. 9, 1970). *But cf.* Watz v. Zapata Off-Shore Co., 431 F.2d 100, 112 (C.A. 5, 1970), explained in 7A Moore, Federal Practice ¶ .325 [1], at 3502 n. 3 (Supp. 1972). In many respects the difference between our framing the inquiry in jurisdictional or choice of law terms is purely semantical. Relationship of the tort to the forum state is fundamental to choice of law analysis, Restatement 2d, Conflict of Laws §§ 6, 145 (1971), and *Executive Jet* has now made clear that the degree of maritime relationship may also influence the jurisdictional issue. Occasionally admiralty borrows state law or uses it for analogies in formulating substantive maritime principles. *See,*

3. Dearborn's liability.

a. Negligence.

[17] The District Court ruled that Dearborn breached a legal duty owing to Monk because its skipper, Armstrong, was negligent in mooring his ship with a seventy-five foot rope to the platform's leeward side, which negligence was causally related to deaths of the crew and of Monk. The District Court found that "[t]he master knew or must, in law, be charged with knowing that the platform was a deteriorated oil storage platform and that welding was being done on the platform, for he carried the equipment for the welding operations to the platform on his boat," and that "Mr. Armstrong, the master, knew or should have known of the hazardous proximity of his boat to potential fires and possible explosion by the fact that he had, at an earlier date, helped to put out a fire on this platform during these repair operations." 340 F. Supp. at 1245. These rulings are adequately supported by the record and are affirmed.

[18] The maritime duty of the shipowner to Monk, that owing to a nonseaman "on board for purposes not inimical to . . . legitimate interests [of the shipowner]," is not one of furnishing a seaworthy hull and appliances without regard to fault, but one of "exercising reasonable care under the circumstances." Kermarec v. Compagnie Generale Transatlantique, *supra;* The Admiral Peoples, 295

e. g., The Tungus v. Skovgaard, 358 U.S. 588, 79 S.Ct. 503, 3 L.Ed.2d 524 (1959); Alcoa S.S. Co. v. Charles Ferran & Co., 383 F.2d 46 (C.A. 5, 1967), cert. denied, 393 U.S. 836, 89 S.Ct. 111, 21 L.Ed.2d 107 (1968); Wilburn Boat Co. v. Fireman's Fund Ins. Co,. 348 U.S. 310, 75 S.Ct. 368, 99 L.Ed. 337 (1955); S.S. Philippine Jose Abad Santos v. Bannister, 335 F.2d 595 (C.A. 5, 1964).

U.S. 649, 55 S.Ct. 885, 79 L.Ed. 1633 (1935); Leathers v. Blessing, 105 U.S. 626, 26 L.Ed. 1192 (1882).

As the District Court noted, the CARRYBACK's master had transported the welding machines to the platform, so he knew that hot work was being conducted around the tanks. Ray, the DEI supervisor prior to Monk's assumption of duties, testified that Armstrong knew of the presence of oil in the tanks and that he knew an oil-soaked board had caught fire a few days before the May 28 explosion. Also, in response to the question, "Did you at any time tell Captain Armstrong, where you got your boat tied up on a short tether, 'You've got a tank up there with hundreds of barrels of oil in it right above your head,' " Ray answered, "Yes, sir." The master, rather than taking steps to avoid the risk of possible fire or explosion, enhanced it by mooring his boat in such a position that the prevailing winds would tend to carry any ensuing flames over his vessel,[28] subjecting those aboard to risk of death or injury in the event an explosion or a fire occurred. Additionally, there was testimony that part of the CARRYBACK's function was to evacuate people from the platform in the event of emergency and that a vessel performing such function customarily held off sufficiently from the platform that she would not expose herself to the same danger from which she might be called on to save others.[29]

28. At the time of year the prevailing winds were generally from the southeast.

29. Dearborn's managing officer was familiar with the Manual for Offshore Operations, published November 23, 1967 by the Offshore Operators Committee. While the Manual does not specifically refer to unmanned collection and storage platforms on which work is taking place, it suggests that drilling units be attended by a standby vessel to assist personnel in the event of an emergency. *Id.* § VIII(1).

There was evidence that there were alternatives to tying up on a short line downwind of the platform when the vessel was not engaged in unloading or taking on men. The testimony showed that the CARRYBACK could have dropped a mooring buoy several hundred feet upwind and tied up to it, or could have tied up to the platform, as she did, but with a rope long enough to take her out of the shadows of the oil filled tanks.

Dearborn's reliance upon the "safe berth" cases[30] as exonerating the CARRYBACK is misplaced. This argument is *sub silentio* an attack on the finding that the master was negligent in mooring where he did. The "safe berth" cases relate to the duty of a wharfinger (or another who invites or directs a vessel to use his berth or dock) to use reasonable diligence to avoid damage to the vessel. They do not exonerate the master from his own duty to moor the vessel in a safe location. Joe Eddie Dyer, the officer of Dearborn who handled arrangements with DEI for the use of the vessel, testified:

> Q. Now, would it be true that Captain Armstrong was in command of the vessel "CARRYBACK" at all times?
>
> A. Yes.
>
> Q. And is it true that under your working arrangement, that Captain Armstrong would have had ultimate authority to have prevented that vessel from being moored or docked at any point that he felt was dangerous?
>
> A. Yes.
>
> Q. You did not—the captain, in his command, did not release any of his authority over the safety of the vessel to anyone else, any client or anyone else, did he?
>
> A. No.
>
> Q. Is it true that the primary responsibility of the master of a vessel is to first look to the safety of the vessel and its crew?
>
> A. Yes.
>
> Q. So as to maintain it operable at all cost?
>
> A. Yes, sir.

The managing officer acknowledged that CARRYBACK was serving as a standby vessel for the C & K platform. The Manual also states that the "prime purpose of the attending vessel [is] to save endangered lives if a possibility exists to save them." *Id.* § VIII(4). Some of the workers from this platform perished in the sea.

30. *E. g.,* Smith v. Burnett, 173 U.S. 430, 19 S.Ct. 442, 43 L.Ed. 756 (1899); Campbell v. Wetherill, 130 F. 213 (E.D. Pa. 1904); Look v. Portsmouth, K & Y St. Ry., 141 F. 182 (D. Me. 1905); Canton Co. v. Brown, 299 F. 147 (C.A. 4, 1924).

Dearborn is also wide of the mark with its argument that while some risk of explosion might have been foreseeable, no reasonable man could expect Monk and the Chapman personnel to weld a line leading directly into the oil-filled tanks.

> Foreseeability does not mean that the precise hazard or the exact consequences which were encountered should have been foreseen. Upon this all are agreed. . . . "[W]hen it is found that a man ought to have foreseen in a general way consequences of a certain kind, it will not avail him to say that he could not foresee the precise course of the full extent of the consequences, being of that kind, which in fact happened."

Harper & James, Law of Torts § 20.05, at 1147 (1956), quoting Pollock, Liability for Consequences, 38 L.Q.Rev. 165, 167 (1922). *Accord,* Restatement 2d, Torts § 435. In this case the precise occurrence was well within the zone of the risk that hot work on the platform would trigger an explosion.

[19] We also reject Dearborn's contention that the CARRYBACK, by being moored too close to the platform, merely created a condition on which intervening negligent forces of others acted and was not itself a proximate cause of the deaths in issue. This theory of proximate causation, now almost universally rejected, in admiralty as elsewhere, is an argument "grow[ing] out of the discredited notion that only the last wrongful act can be a cause—a notion as faulty in logic as it is wanting in fairness." In re Kinsman Transit Co., 338 F.2d 708, 719 (C.A. 2, 1964), cert. denied sub nom. Continental Grain Co. v. City of Buffalo, 380 U.S. 944, 85 S.Ct. 1026, 13 L.Ed.2d 963 (1965). The correct rule is that actionable negligence may consist of failure to take precautions against foreseeable acts of third persons, and this rule applies though the conduct of the third person is itself negligent. Restatement 2d, Torts §§ 302, 302A; Transcontinental Gas Pipe Line Corp. v. Mobile Drilling Barge, 424 F.2d 684, 689 (C.A. 5), cert. denied sub nom. Ocean Drilling & Exp. Co. v. Signal Oil & Gas Co., 400 U.S. 832, 91 S.Ct. 65, 27 L.Ed.2d 64 (1970); Horton & Horton, Inc. v. T/S J. E. Dyer, 428 F.2d 1131 (C.A. 5, 1970), cert. denied, 400 U.S. 993, 91 S.Ct. 461, 27 L. Ed.2d 441 (1971); Harper & James, Law of Torts § 20.-05, at 1144 n. 34 (1956). *See also* Restatement 2d, Torts § 449.

The conclusion that Dearborn was negligent must be affirmed. Dearborn urges that if the manning and inspection requirements discussed in part b, immediately following, are inapplicable to the CARRYBACK, its only remaining negligence is that attributable to it from Captain Armstrong's own actions in mooring too close to the platform, and in that event, Dearborn asserts, the Armstrong

claimants cannot recover against Dearborn on negligence grounds. This contention is for the District Court on remand.

b. Unseaworthiness.

We are unable to affirm the finding that CARRYBACK was unseaworthy. The District Court's conclusions that the vessel violated manning and inspection requirements imposed by statute(s) and regulations are central to the unseaworthiness question, and (as noted in the last sentence of part a, just above) also relate to the question of Dearborn's negligence. For reasons which follow, that issue must be reconsidered by the District Court. Additionally the unseaworthiness issue spills over to the question of limitation of liability, part 9, *infra*.

As we construe the opinion of the District Court, the CARRYBACK was found unseaworthy for at least three partially overlapping reasons: (1) She did not have a competent crew. This includes subsidiary findings that she did not have a licensed pilot required for passenger-carrying vessels as referred to in 46 U.S.C. § 404 and that Captain Armstrong was not a licensed master. Possibly it also includes a finding that independently of failure to comply with a licensing requirement Armstrong was an incompetent master, because he lacked knowledge of where the vessel should be moored in relation to the platform and because he moored close to the platform with actual knowledge that small fires already had occurred on the platform and knowledge (actual or chargeable) of the welding being done on the platform.[31]

31. And, though the court does not mention it at this point in its opinion, with actual knowledge, according to Roy's testimony, that there was oil in the tanks.

(2) The vessel did not have a certificate of inspection. (3) There was a "congeries" of conditions creating unseaworthiness,[32] including: (a) the method of mooring the boat under the circumstances of the obviously deteriorated state of the platform; (b) placing in charge a master who did not have the competence to know to moor farther out from the platform or to request or recommend a mooring buoy that would permit such safer mooring; (c) failure to be equipped with a mooring buoy.

We turn first to the manning and inspection requirements. The physical dimensions of the CARRYBACK, 85 feet in length and 136 gross tons, were within the language of 46 U.S.C. § 404, but Dearborn insists this section has no application to her because she was not a vessel "carrying passengers for hire" within the meaning of that section. The section provides in pertinent part:

> The hulls and boilers of every ferryboat, canal boat, yacht or other small craft of like character propelled by steam, shall be inspected under the provisions of this title. Such other provisions of law for the better security of life as may be applicable to such vessels shall, by the regulations of the Secretary of the department in which the Coast Guard is operating, also be required to be complied with before a certificate of inspection shall be granted, and no such vessel shall be navigated without a licensed engineer and a licensed pilot: *Provided,* That in open steam launches of ten gross tons and under one person, if duly qualified, may serve in the double capacity of pilot and engineer. All vessels of above fifteen gross tons carrying freight for hire and *all vessels of above fifteen gross tons and in excess of*

32. Citing Robinson v. Showa Kaiun K.K., 451 F.2d 688 (C.A. 5, 1971).

> *sixty-five feet in length carrying passengers for hire,* but not engaged in fishing as a regular business, propelled by gas, fluid, naphtha, or electric motors,*shall be subject to all the provisions of this section* relating to the inspection of hulls and boilers and *requiring engineers and pilots,* and for any violation of the provisions of title 52 of the Revised Statutes applicable to such vessels, or of rules or regulations lawfully established thereunder, and to the extent to which such provisions of law and regulations are so applicable, the said vessels, their masters, officers, and owners shall be subject to the provisions of sections 494-498 of this title, relating to the imposition and enforcement of penalties and the enforcement of law. (emphasis added)

[20] At trial Dearborn attempted unsuccessfully to develop a theory that it had made a bareboat charter of the boat to DEI which was engaged in transporting only its own employees. 46 U.S.C. § 390(a) defines "passenger" as "every person carried on board a passenger-carrying vessel," with certain exceptions. Sub-part (4) thereof excepts "any employee of the bareboat charterer." Dearborn reasoned that since there were no "passengers" carried, the vessel dropped out of the scope of § 404. See United States v. The Reefer King, 90 F. Supp. 236 (W. D. Wash. 1950). This point has been abandoned on appeal, and wisely so.[33] But Dearborn claims that regard-

33. There was a total failure of proof that a bareboat charter was made. Dearborn's officer who handled the arrangements with DEI was firm in his testimony that a bareboat charter was not intended, that the arrangement by which Dearborn's boat, crew and master carried out the functions which we have described (for $350 per day plus consumables) was a temporary one until a bareboat charter could be worked out at a future time, and that the charter was never worked out. With no substantial factual predicate, Dearborn attempted at trial to bring itself within what witnesses described as standard practice employed by firms supplying boats and services

less of how the arrangement between it and DEI is characterized—whether as bareboat charter, time charter, or a contract to furnish services pursuant to which Dearborn undertook to transport passengers out to the platform and back[34]—§ 404 applies exclusively to what Dearborn terms "public conveyances" of passengers. While Dearborn nowhere sets out what it contends "public conveyances" includes, it urges that the term excludes an arrangement made by special contract between private parties for transportation of employees of a non-owner party, the very arrangement which it claims existed between it and DEI. We find the argument unpersuasive. First, to accept it would knock a giant hole in the regulatory scheme. Section 404 contains no such limitation. It does not state or suggest that Congress intended to exempt

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to the offshore oil industry in the Gulf, pursuant to which the supplier enters into two agreements, a bareboat charter of the vessel and a separate operating agreement (at times made by another legal entity) under which a crew is supplied. This is the "thin weight of paperwork" to which the District Judge referred as a device to avoid the safety requirements of § 404. 340 F.Supp. at 1243. But in this case no such arrangement was made. The trial judge's reference to "dummy corporations" arose from the fact that there were several corporations in the "Dearborn group" that were subsidiaries of a common parent and sharing the same officers, directors and quarters, and, that as part of its "bareboat charter" effort, Dearborn sought to spin out a theory that the boat was chartered by one subsidiary and the crew furnished by another. This effort foundered along with the "bareboat charter" theory, and in the end Dearborn conceded that the several corporations were in effect a single entity.

With the case in this posture we need not rule on the effect *vel non* that an arm's length bareboat charter will have upon the safety requirements of 46 U.S.C. § 404. Compare 46 U.S.C. § 497 and the language of § 404 referring to §§ 494-498. Nor do we need to rule on the District Judge's statements concerning "paperwork" arrangements carried out through dummy corporations for the purpose of evading § 404.

34. The latter appears to be the characterization intended by District Judge Singleton in the decision below.

private arrangements like the one between Dearborn and DEI. Moreover, Coast Guard regulations define "carrying passengers for hire" as "[t]he carriage of any person or persons by a vessel for a valuable consideration, whether directly or indirectly flowing to the owner, charterer, operator, agent or any other person interested in the vessel." 46 CFR § 70.10—3. This interpretation, made by the enforcing agency and hence highly probative of the statute's true meaning, clearly negates the existence of the claimed exemption.

In The Jacob G. Neafie, 8 Ben. 251, 13 Fed. Cas. p. 266, No. 7,156 (E. D. N. Y. 1875), a statutory penalty was sought against a steam tugboat navigating in New York harbor which had transported passengers without the certificate of inspection required of "every steam vessel carrying passengers" by then R. S. § 4417, now 46 U.S.C. § 391. The sufficiency of the libel was questioned on the ground the vessel was a tugboat not engaged in regular service as a carrier of passengers. To this the court responded:

> The libel does, however, show that the vessel proceeded against on the 28th of November, 1874, received on board and carried passengers in the harbor and bay of New York, and it may fairly enough be considered to aver that on that day she was employed in the service of carrying passengers for fares as part of her business for that day. So understood, the libel is sufficient. The intention of the act is to compel every steam vessel, before engaging in the service of carrying passengers, to be inspected, with a view of ascertaining whether she may be used to transport passengers with safety to life. The necessity for inspecting exists, as well where the vessel engages in the business of carrying passengers for

> a single occasion and outside of her regular business, as when her daily occupation is the carrying of passengers; and such a vessel should be held to be a vessel employed in the service of carrying passengers, within the meaning of section 4417. My conclusion, therefore, is, that the libel sufficiently states an offense, and that the exceptions must be overruled, with liberty to answer within one week.

13 Fed. Cas. at 267.

Second, the statutory history, a long and tortuous one, does not support the public conveyance-private contract distinction asserted by Dearborn. Section 404 derives from R. S. § 4426 and from an 1871 Act, 16 Stat. 456, requiring ferryboats, canal boats, yachts, or other small craft of like character propelled by steam, to have a certificate of inspection, and forbidding navigation without a licensed engineer and a licensed pilot. In 1896 Congress undertook to amend R. S. § 4426 to subject to regulation and inspection vessels generally referred to as launches or "naphtha launches" of over fifteen tons and carrying passengers or freight for hire.[35] There were two Congressional references to "ferry boats" as examples of vessels carrying passengers for hire,[36] but the major area of concern appeared to be differentiation between the vessels to be covered and vessels used for pleasure.[37] The proposed legislation was enacted in 1897, extending the § 4426 requirements of inspection and of pilots and engineers to "vessels of above fifteen tons burden, carrying freight or passengers for hire, propelled by gas, fluid,

35. See 28 Cong. Rec. 784, Jan. 20, 1896.

36. 28 Cong. Rec. 3915, Apr. 13, 1896; 28 Cong. Rec. 4846, May 5, 1896.

37. 28 Cong. Rec. 4846, *supra*.

naphtha, or electric motors."[38] Additionally, the bill brought the newly covered vessels within the rules of the road. It would make little sense that vessels classified by size and method of propulsion and carrying passengers for compensation should be subject to the rules of the road if they were "public conveyances" but not subject if performing the same function by some private arrangement.

In 1905 Congress reenacted the 1897 provision for boats fifteen tons and over and added a penalty clause.[39] In 1906 an exclusion was added to § 4426 for fishing vessels.[40] If, as Dearborn contends, "vessels carrying passengers for hire" refers only to "public conveyances," it would not have been necessary to create a special exclusion for fishing vessels, which do not normally serve as "public conveyances."

The meaning of "passengers for hire" in § 404 is pointed up further by the Act of May 10, 1956.[41] By that Act Congress enacted what is now §§ 390—390g and amended § 404. The legislative background discloses a Congressional intent to require inspection and certification of certain small vessels carrying passengers and not theretofore covered by federal safety requirements. Several casualties, in which numerous passengers lost their lives aboard "small mechanically propelled passenger-carrying

38. Act of Jan. 18, 1897, 29 Stat. 489.

39. This was necessitated by a federal decision that while the 1897 legislation subjected vessels to inspection and the necessity for licensed officers it permitted no punishment of boats or masters for violations. See Annotation to 46 U.S.C.A. § 404.

40. See Annotation to 46 U.S.C.A. § 404; Act of May 16, 1906, 34 Stat. 193.

41. 70 Stat. 153.

vessels for hire," see 1956 U.S. Code Cong. & Admin. News, pp. 2527, 2528, focused the legislators' attention on a gap in the regulatory scheme. The vessels on which the accidents occurred fell between § 404 (covering vessels of more than fifteen gross tons carrying [freight or] passengers for hire) and the Federal Motor Boat Act of 1940, 46 U.S.C. § 526 et seq. (since repealed in part) (covering pleasure craft). *Id.* at 2527. To fill this gap came the 1956 Act, providing in § § 1—10, codified as 46 U.S.C. §§ 390—390g, for inspection and certification of smaller passenger-carrying vessels. In no respect does the coverage of this broadened statutory system appear to be limited by the status of the vessel as a "common carrier" or "public conveyance." Rather, a line is drawn in terms of the status of the passenger, that is, whether he has or has not contributed consideration for his carriage. Sec. 1 of the Act, 46 U.S.C. § 390, defines passengers as all persons aboard a passenger-carrying vessel and then except from this catagory crew members who are paid for their services and have "contributed no consideration for their carriage" [sub-part (a)(2)]. It also excepts a guest aboard a pleasure vessel "who has not contributed any consideration directly or indirectly, for his carriage" [sub-part (a)(5)]. The payment or lack of payment of consideration, direct or indirect, is the same distinction employed in the Coast Guard Regulation, 46 CFR 70.10—3. Sub-part (6) of Subsec. 1(a) of the Act, 46 U.S.C. § 390(a)(6), was added to exempt tugboats and towboats occasionally carrying more than six nonpaying guests for harbor and dock inspection trips. See 1956 U.S. Code Cong. & Admin. News p. 2530. No such exemption would have been necessary if the Act were to be limited to "public conveyances" of passengers, a category

that hardly includes tugboats and towboats. It appears to have been intended that the new inspection and certification procedures under §§ 390—390g and those already existent under § 404 should together form an integrated regulatory scheme for small passenger-carrying vessels not under the Motorboat Act of 1940. It would be anomalous indeed if vessels falling under § 404 are limited to those serving as "public conveyances" while the smaller vessels under § 390 are not so limited.

The linking together of §§ 390—390g and § 404 is further demonstrated by the fact that sub-part 6(a) of the 1956 Act (which amended § 404) expressly dropped from coverage under § 404 certain small vessels—those over fifteen tons but sixty-five feet or less in length—in order that they could be included in § 390 coverage. See 1956 U. S. Code Cong. & Admin. News p. 2530. Additionally, the sections are linked by the provisions in § 390 that its definitions are applicable to § 404 unless the context requires otherwise.

The only authority offered by Dearborn in support of its theory of the meaning in § 404 of "carrying passengers for hire" is language from Carlsen v. Paladini, 5 F.2d 387 (CA9 1925). The vessel in that case was a motorboat used to perform a contract to transport materials, supplies and equipment for a construction company. Employees of the construction company sought and obtained a free ride, and were hurt when steel cables linking the THREE SISTERS to a barge she was towing parted. The owner sought limitation of liability, and the injured persons opposed it on the ground the THREE SISTERS was carrying passengers without a certificate of inspection. The court held that the THREE SISTERS was not a pas-

senger carrying vessel, giving several reasons. Neither the employer of the riders nor the riders paid any fare or the equivalent or had a contract for such payment; the owner had no contract with the employer to transport passengers; the boat was not a public conveyance, did not hold itself out as a common carrier, and her business was towing upon occasional engagements. These references to "common carrier" and "public conveyance" in the recital of reasons why the vessel was not a passenger carrying vessel are not authority that § 404 is limited to "common carriers" or "public conveyances." Dearborn's argument that the CARRYBACK was not within § 404 because, though fifteen miles from shore, between a trip out and a trip back, it was tied up at the moment of explosion and hence not being "navigated", is frivolous. United States v. Monstad, 134 F.2d 986 (CA9 1943); Carr v. Hermosa Amusement Corp., 137 F.2d 983 (CA9 1943), cert. denied, 321 U.S. 764, 64 S.Ct. 520, 88 L.Ed. 1060 (1944).

[21] Summarizing, we reject Dearborn's theory that the CARRYBACK was not subject to § 404 because that section is limited to "public conveyances" of passengers, which does not include an arrangement by special contract between private parties to transport employees of the non-owner party, and we conclude that CARRYBACK was a vessel "carrying passengers for hire" as that term is used in § 404. Beyond that point we are unwilling to go. Without indicating any view on a decision one way or the other, we simply say that on what is before us we are unable to determine with any sense of assurance the extent, if any, to which manning and certification requirements apply to a vessel "carrying passengers for

hire" as that term is employed in § 404.[42] The briefs give us little assistance. The District Court refers in most instances to the lack of a licensed master. Section 404 refers to a licensed pilot. The parties shift indiscriminately from one term to the other. Dearborn asserts, without citation of authority, that § 404 has no application in offshore waters, and that the licensing agency, the Coast Guard, does not require licensed pilots or certificates of inspection on small boats such as the CARRYBACK transporting passengers and material to offshore oil platforms. It makes a policy argument, without supporting evidence, that the offshore boat industry servicing offshore platforms in the Gulf operates without licensed pilots (and/or masters?) and will be thrown into chaos by judicial imposition of licensing and inspection rules not provided for by law or required in practice.

We will not embark "without a pilot, rudder, compass or radar—on an amateur's voyage on the fog-enshrouded sea"[43] of the manning and inspection statutes.[44] Ultimately the voyage may be short and uneventful, but that is not apparent to us.

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42. For starters, see 46 U.S.C. §§ 404(a), 372, 375, 390, 390a-390d, 391, 392, 400, 402, 414, 416, 435, 436, 451-453, 460-462, 463a, 472, 491, 497, and 46 C.F.R. Subchapter H.

43. Frank J., concurring in United States v. Flores-Rodriguez, 237 F.2d 405, 412 (C.A. 2, 1956).

44. There are other questions lurking in the wings. Is there evidence of any lack of qualification by Armstrong, other than his improperly mooring the boat, and can improper mooring by a crew member not shown to be otherwise incompetent constitute unseaworthiness? To constitute unseaworthiness based upon an incompetent crew, was Dearborn required to have, and did it have, knowledge of Armstrong's incompetency? If CARRYBACK was not unseaworthy and Armstrong's only viable claim against Dearborn is in negligence, is the only negligence of Dearborn that imputed from Armstrong or is there an additional periphery of Dearborn negligence?

Because the violations of the manning and inspection requirements were included in the conditions creating unseaworthiness on a "congeries" theory, it may be necessary for the District Court to reconsider its findings on that theory. Whether the "congeries" approach is correctly applicable we decline to decide at this time.

4. Chapman's liability.

Chapman was found liable under the doctrine of respondeat superior for the negligence of Scanlan, one of its pushers. As the District Court reconstructed the events, Monk had instructed Scanlan to remove a valve from the equalizer line. Scanlan's workmen were unable to remove it with wrenches, so Overly, Chapman's jobsite superintendent, instructed them to cut it out with a pipecutter, which they did. Scanlan then told Monk that he was going to weld the line, now in two pieces. Though Monk assumed that the pipe was to be removed from the tank and carried to the side to be welded, Scanlan directed Gaspard to weld it in place. The District Court concluded that Scanlan was negligent in failing to check for the presence of oil in the tanks and in failing to inquire of Monk in greater detail about the desirability of welding the line in place, and Chapman does not contest this conclusion. The question on which the parties have joined issue is whether at the time of the explosion Scanlan was Chapman's employee or whether he was exclusively DEI's borrowed employee. *See generally* Restatement 2d, Agency §§ 219, 220 (1958). At stake is Chapman's liability to the captain and crew members of the CARRYBACK, which the litigants treat as governed by federal

law.[45] Nevertheless, all parties rely on both Texas and federal cases, and we find the former helpful by analogy. The result is the same under either body of law.

[22-27] Without doubt the platform workers were Chapman's general employees. It carried them on its payroll, withheld their income taxes and contributions to F.I.C.A., and carried workmen's compensation and liability insurance. Under Texas law, however, the negligence of such general employees is not to be imputed to the general employer if for a specific job the employee has relinquished to another temporary employer exclusive control over the employee. T. G. & M. Drilling Co. v. Kersh, 295 S.W.2d 466 (Tex. Civ. App. 1956, no writ); Magnolia Pet. Co. v. Francis, 169 S.W.2d 286 (Tex. Civ. App. 1943, writ ref'd), and the same is true under federal law, Standard Oil Co. v. Anderson, 212 U.S. 215, 29 S.Ct. 252, 53 L.Ed. 480 (1909). The burden is on Chapman as the putative employer to show that Scanlan was not its employee. The original employment relationship is presumed to continue unless the temporary employer's control over the worker is so pervasive as to be inconsistent with that presumption. *See* Kiff v. Travelers Ins. Co., 402 F.2d 129 (C.A. 5, 1968); Producers Chem. Co. v. McKay, 366 S.W.2d 220 (Tex. 1963); Restate-

45. We have already held in part 2, *supra*, that any liability of Chapman to Monk's heirs is barred by Monk's contributory negligence under the applicable Texas law. Chapman makes no claim that its liability for the death of Captain Armstrong, who was found guilty of contributory fault, must be determined under Texas law. The two crewmen on the CARRYBACK were guilty of no contributory fault. Chapman does not raise as an issue on appeal the correctness of the ruling that it, C & K, DEI and Dearborn were liable for the property damage to the CARRYBACK diminished under admiralty principles by Dearborn's percentage of comparative fault.

ment 2d, Agency § 227, comment b. Factors helpful in deciding whether a new employment relationship has replaced the old are the extent of the temporary employer's control over details of work, his furnishing of the necessary tools, his right to discharge the employees, and his obligations for payment. *See* Ruiz v. Shell Oil Co., 413 F.2d 310 (C.A. 5, 1969); Restatement 2d, Agency § 220. Agreements among the parties assigning the responsibility for supervising the worker are additional guides. *Compare* Magnolia Pet. Co. v. Francis, *supra*. Also, liability under respondeat superior has generally been imposed on the putative employer who has represented his worker as possessed of a certain skill if actionable negligence has occurred in the exercise of that skill.[46]

[28] The evidence amply supports the District Court's conclusion that Chapman did not cede to DEI sufficient control of its employees to relieve it of responsibility for their torts. The oral understanding between the parties was that Chapman would provide equipment and a skilled crew of welders, pipefitters, and sandblasters who would be supervised by Chapman personnel—Chapman's crew superintendant (Overly), and three Chapman pushers, one of whom was Scanlan. Williams, president of DEI, testified that "we wanted some people that were skilled craftsmen that could—that had the practical knowledge of how to hook lines up and follow through with the job." Monk, DEI's engineer, generally supervised all platform work, but responsibility for directing details of

46. *Compare* Standard Oil Co. v. Anderson, 212 U.S. 215, 29 S.Ct. 252, 53 L.Ed. 480 (1909); Producers Chem. Co. v. McKay, 366 S.W.2d 220 (Tex. 1963); Dugas v. Pelican Constr. Co., 481 F.2d 773 (C.A. 5, 1973); Herndon v. Halliburton Oil Well Cementing Co., 154 S.W.2d 163 (Tex. Civ. App. 1941, writ ref'd w.o.m.), *with* Hilgenberg v. Elam, 145 Tex. 437, 198 S.W.2d 94 (1946).

the welding and pipefitting was with Overly and the Chapman pushers. Monk was "there to show them the direction of the whole job, but not to sit there and show every man on that platform exactly what to do." Most importantly, the negligence of Scanlan imputed to Chapman occurred in the operational phase of the work. Monk had directed that a valve be removed, but Overly and Scanlan worked out the specific manner of removal and the subsequent welding. Thus Scanlan's negligence was in conducting a phase of the operation which Chapman had represented its workers competent to perform and over which Chapman personnel had retained a measure of control.

A case close in point is Producers Chem. Co. v. McKay, *supra*. Producers furnished an air compressor and an operator (McDonald) to Canadian River, a drilling contractor, for use in an air drilling project. Sears of Canadian River was responsible for telling McDonald where to connect his compressor and for instructing him when to start it, but McDonald remained responsible for its actual operation. While running the compressor McDonald negligently permitted compressed air and oil to mix in dangerous quantities, and an explosion occurred. The Texas Supreme Court, through Chief Justice Calvert, held that Producers was liable under respondeat superior for McDonald's negligence in operating the compressor. *See also* Aluminum Co. of America (ALCOA) v. Commercial Contracting Co., 438 S.W.2d 853 (Tex. Civ. App. 1969, no writ); Herndon v. Halliburton Oil Well Cementing Co., 154 S.W.2d 163 (Tex. Civ. App. 1941, writ ref'd w.o.m.). Federal cases of similar import are Standard Oil Co. v. Anderson, *supra*, in which a shipowner was held liable for its winchman's negligence in

helping a stevedore to unload a vessel, and Dugas v. Pelican Constr. Co., 481 F.2d 773 (C.A. 5, 1973), in which this court held that a drilling contractor was not the borrowed employer of a roustabout furnished by a labor contractor.

[29] As an independent ground for imposing liability on Chapman, the District Court found that its vice-president, Rick Chapman, negligently failed to warn his employees of the presence of oil in the tanks. Chapman denies that Rick Chapman knew of the oil, but the District Court found as a fact on adequate supporting evidence that Ray, a DEI engineer, warned Rick Chapman of the oil just four days before the explosion and told him, among other things, that working on the platform was like working on a bomb. Chapman's argument that Rick Chapman had no authority to warn his men, whom he knew would be welding around oil-filled tanks, disregards the District Court's conclusion, based on adequate evidence, that the exercise of reasonable care demanded no less.

We affirm the finding that Chapman was liable for negligence.

5. The Armstrong claim.

C & K, Chapman, DEI and Dearborn were held liable for the death of Captain Armstrong with 25% contributory fault. C & K and DEI have not contested their liability. Chapman has raised only the question of its negligence, and we affirm on that issue.

6. Love and Cassel.

C & K and DEI do not dispute their liability for the death of crewmen Love and Cassel. We have affirmed

findings that Chapman was negligent and that Dearborn was negligent, although the extent of Dearborn's negligence is uncertain, and we have directed the District Court to reconsider unseaworthiness.

7. Property damage.

Only Dearborn has appealed from the District Court's rulings on damage to the CARRYBACK. It argues that the conduct of its employee, Armstrong, did not contribute to the destruction of the vessel, and that therefore its recovery from C & K, DEI and Chapman should not have been reduced by 25%. Our discussion in part 3a *supra* disposes of this point.

8. Indemnity.

At issue is distribution among C & K, DEI, Chapman and Dearborn of damages awarded three categories of claimants: (a) Love and Cassel, crew members aboard the CARRYBACK; (b) Armstrong, the master; and (c) Monk.

a. Love and Cassel.

Damages to the estates of Love and Cassel were divided equally among C & K, DEI, Chapman, and Dearborn.[47] Under the judgment each party was made liable for one-fourth of the award. Dearborn contends that it should have been awarded full indemnity from either C & K, DEI, or Chapman even though there was no contract of indemnity between Dearborn and any one of them.

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47. The District Court awarded C & K indemnity from DEI on the basis of a contractual provision. 340 F.Supp. at 1239. This award has not been appealed.

[30] Damages are sometimes shifted from one tortfeasor to another under the tort indemnity rule of Tri-State Oil Tool Indus., Inc. v. Delta Marine Drilling Co., 410 F.2d 178 (C.A. 5, 1969), which entitled a tortfeasor guilty of only "technical or passive" negligence to indemnity from a co-tortfeasor guilty of "active or affirmative" negligence.[48] It is unavailing to Dearborn, however, because the conduct on which its liability is based—i.e., improper mooring of the CARRYBACK—is not sufficiently different in kind or degree to be distinguished from the conduct of the other tortfeasors. They were all guilty of what may fairly be described as "active" misconduct.

[31] The other theory of indemnity advanced by Dearborn derives from Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956), in which a shipowner found liable to a longshoreman under the doctrine of unseaworthiness was allowed indemnity from the stevedore for breach of its warranty of workmanlike performance. Though the Supreme Court stressed the award was based on the "essence of the stevedoring contract," *id.* at 133, 76 S.Ct. at 237, 100 L.Ed. at 142, we have extended it to the shipowner-ship repairer relationship, Lusich v. Bloomfield S.S. Co., 355 F.2d 770 (C.A. 5, 1966), and to a drilling barge owner-independent drill pipe contractor relationship, Whisenant v. Brewster-Bartle Offshore Co., 446 F.2d 394 (C.A. 5, 1971). In each of these cases a vessel owner entrusted control of his vessel to a contractor whose negligent acts made the owner liable for breach of his nondelegable duty to furnish seaworthy appliances. That kind

48. *See generally* Hodges, Contribution and Indemnity Among Tortfeasors, 26 Tex. L. Rev. 151, 153-157 (1947); 41 Am. Jur. 2d, Indemnity §§ 19-27 (1968).

of relationship is lacking between Dearborn and the platform defendants, and indemnity is accordingly unavailable in light of this court's persistent admonitions not "to extend [*Ryan-type* indemnity] beyond those controversies involving the 'special rules governing the obligations and liability of shipowners' which necessitated its formulation and justify its application." Ocean Drilling & Exp. Co. v. Berry Bros. Oilfield Serv., Inc., 377 F.2d 511, 513 (C.A. 5), cert. denied, 389 U.S. 849, 88 S.Ct. 102, 19 L.Ed.2d 118 (1967). *Accord,* Smith Pet. Serv., Inc. v. Monsanto Chem. Co., 420 F.2d 1103, 1109-1111 (C.A. 5, 1970); Delta Engineering Corp. v. Scott, 322 F.2d 11 (C.A. 5, 1963), cert. denied, 377 U.S. 905, 84 S.Ct. 1164, 12 L.Ed.2d 176 (1964); Halliburton Co. v. Norton Drilling Co., 302 F.2d 431 (C.A. 5, 1962), cert. denied, 374 U.S. 829, 83 S.Ct. 1870, 10 L.Ed.2d 1052 (1963); Transcontinental Gas Pipe Line Corp. v. Mobile Drilling Barge, 424 F.2d 684, 693 (C.A. 5), cert. denied sub nom. Ocean Drilling & Exp. Co. v. Signal Oil & Gas Co., 400 U.S. 832, 91 S.Ct. 65, 27 L.Ed.2d 64 (1970). Loffland Bros. Co. v. Roberts, 386 F.2d 540, 549 (C.A. 5, 1967), cert. denied, 389 U.S. 1040, 88 S.Ct. 778, 19 L.Ed.2d 830 (1968).

b. Armstrong.

The District Court ordered C & K, Chapman, and DEI to join in indemnifying Dearborn for the share of the Armstrong award that it was required to pay. In view of the questions relating to Armstrong's right to recover from Dearborn and the basis thereof, the award of indemnity to Dearborn should be reconsidered.

c. Monk.

The District Court shifted C & K's share of Monk's damages to Dearborn under a complex theory. Since C & K is relieved of liability to Monk, we need not review this point.

9. Limitation of liability.

The District Court judgment denied limitation of liability to Dearborn but without entering findings on privity or knowledge. On appeal the parties adverse to Dearborn on this issue focus upon the alleged failure to comply with the manning and inspection requirements discussed in section 3b, *supra*. Our disposition of that issue requires that the District Court reconsider the limitation question.[49]

10. Damages on the Monk claim.

[32] The court included in the damages to the Monk claimants a specific award of $25,000 for his pain and suffering. Assuming but without deciding that damages for pain and suffering were recoverable[50] the evidence is not sufficient to sustain an award. There was evidence that approximately fifteen minutes before the explosion Monk was within the interior of the vessel, and no one saw him

49. Dearborn's contention that CARRYBACK was not a seagoing vessel is frivolous. See 3 Benedict, Law of Admiralty, § 494 at 405-08 (6th ed. 1940).

50. On a theory that DOHSA did not preempt the separate remedy encompassed in state survival statutes that preserve in a decedent's estate the cause of action which up to the time of his death the decedent had for pain and suffering and would have been able to enforce had he survived, see Dugas v. National Aircraft Corp., 438 F.2d 1386 (C.A. 3, 1971), or on a theory based upon Dennis v. Central Gulf Steamship Corp., 453 F.2d 137 (C.A. 5, 1972), cert. denied, 409 U.S. 948, 93 S.Ct. 286, 34 L.Ed.2d 218, extended to offshore waters.

alive thereafter. His body was found on the weather deck at the forepeak, the furthermost point of the vessel from the storage platform. Cassel's body was found in his bunk, Armstrong's body was found in the sea, and Love's body was never found.

On these facts the District Court concluded that Monk must have been within the vessel when the flaming ball fell on it and was not killed immediately but sought to find some way of escape, and for a period of several minutes until death overtook him at the forepeak suffered excruciatingly. The court found that the explosion and fire on the platform caused "a flaming ball . . . to fall as if it were an exploding bomb onto the *Carryback*." The immediacy of the occurrence and the absence of other evidence make too speculative the finding that Monk survived for a matter of minutes and made his way to the forepeak.

11. Interest and attorney fees.

[33] The court awarded $10,738.82 to Dearborn against C & K for services of boat and crew under the oral agreement for the period actually used but disallowed prejudgment interest. Under well-settled admiralty rules the allowance of prejudgment interest is discretionary. Williams v. United States, 443 F.2d 1151 (C.A. 5, 1971). The court disallowed such interest to all property damage, personal injury and death claimants, and additionally, there was confusion whether invoices should be sent to C & K or DEI. There was no error in disallowing interest on this particular claim.

[34, 35] Dearborn complains of the refusal of attorney fees on the sum awarded for services of boat and crew,

under Article 2226, Texas Civil Statutes. Assuming that this state statute would apply to an admiralty contract, the award of fees is discretionary under Texas law, Rampy v. Rampy, 432 S.W.2d 175 (Tex. Civ. App. 1968), and the refusal to award was not error.

12. Relative fault and damages.

The extent of Dearborn's and Armstrong's fault is in question because of the manning and inspection and unseaworthiness issues. It is for the District Court, after determining these issues, to consider whether relative fault among the defendants, comparative fault of Armstrong, and division of responsibility for damages must be reconsidered and reallocated.

* * *

Affirmed in part and reversed in part. The judgment of the District Court is vacated and the case is remanded for further proceedings not inconsistent with this opinion.

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 72-2704

DEARBORN MARINE SERVICE, INC

v.

CHAMBERS & KENNEDY

(April 23, 1975)

Brown, Chief Judge, dissenting from denial of rehearing en banc:

Executive Jet[1] is the first Supreme Court case abandoning the traditional "ebb and flow of the navigable waters" test for admiralty tort jurisdiction. Today the Court lets stand a panel decision extending the rationale of *Executive Jet* to produce the result that one man's death is governed by two different systems of law. I think the result is wrong but in any event the question thus decided is an important one—and, therefore, worthy of consideration by the full Court.

In cases where the *Executive Jet* result was urged, but rejected, e.g., Atlantic Transport Co. v. Imbrovek, 1914, 234 U.S. 52, 34 S.Ct. 733, 58 L.Ed. 1208, the Court has shown itself receptive to a broad concept of maritime service. While the language in Part I of *Executive Jet* is broad, the actual holding in Part IV is narrowly drawn.

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1 Executive Jet Aviation v. Cleveland, 1972, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454.

It relies heavily on the fact (i) air transportation involves problems sustantially different from those admiralty rules are designed to resolve, and (ii) the situs situation is highly fortuitous in cases of air disaster.[2]

I am not convinced either factor has a counterpart in this case. The problems land-based parties face in protecting persons aboard nearby vessels have long been dealt with by admiralty rules, e.g., Kelly v. Smith, 5 Cir., 485 F.2d 520, *cert. denied sub nom,* Chicot Land Co. v. Kelly, 1974, ____U.S.____, 94 S.Ct. 1991, 40 L.Ed.2d 558; Re Motor Ship Pacific Carrier, 5 Cir., 489 F.2d 152, *Cert. denied sub nom.* Union Camp Corp. v. Gypsum Carrier, Inc., 1974, ____U.S.____, 94 S.Ct. 2643, 41 L.Ed.2d 235. And I think the *Executive Jet* Court found fortuity an important factor because injury would have been sustained whether impact was with land or water. In this case Monk's situs on the High Seas was fortuitous, but he would not have sustained the instant injury *but for* that situs.

Nor should the panel have relied on Rodrique v. Aetna Casualty & Surety Co., 1969, 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360, for the proposition "Congress did not intend that application of state law necessarily should cease at the physical boundaries of the platform."[3] To

2. "The anomally is well illustrated by the hypothetical case of two aircraft colliding at a high altitude with one crashing on land and the other in a navigable river. If . . . the respondent's position were adopted, jurisdiction would depend on whether the plane happened to be flying over land or water when the original impact of the alleged negligence occurred. This circumstance, too, could be totally fortuitous." 409 U.S. at 267, 93 S.Ct. at ____, 34 L.Ed2d at 467.

3. Dearborn Marine Service, Inc. v. Chambers & Kennedy, 1974, 499 F.2d 263, 273.

the extent the panel means to rely on OCSLA,[4] I think it incorrectly interprets both *Rodrique* and the legislative intent. The question Congress decided was whether to *extend* admiralty law inward—onto the platform. It decided not to, and relied on the *traditional* maritime principles relating to man-made structures attached to the ocean's floor—piers, wharfs, etc. I certainly find nothing in that rationale to support the panel's erosion of the traditional principles relating to persons injured on board vessels.

Experience demonstrates daily that *Rodrique,* conceived by the Court in the beneficent object of protecting and advancing the rights of shore-based workers employed on offshore platforms by applying to them the legal rights accorded by the adjacent state, actually diminishes them and subjects them and their heirs to awful consequences of technical rules long since rejected by the admiralty. Thus we see rights accorded by the admiralty—indeed held applicable vis-a-vis M/V Carryback—taken away by the Texas rule on contributory negligence. Today it is contributory negligence. Tomorrow it will be the state statute of limitations. *See,* Huson v. Otis Engineering Corp., 5 Cir., 1970, 430 F.2d 27 at 27-28, *aff'd on other grounds sub nom.* Chevron Oil Co. v. Huson, 1971, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296. Next month it will be the stringent Louisiana "statutory employer" defense. *See,* Roelofs v. United States, 5 Cir., 1974, 501 F.2d 87, 90 n. 7.

The panel's basic position is Monk's presence aboard the vessel was non-maritime in nature. We do not have to make either a blue water or *Sieracki*-ambiguous-am-

4. The Outer Continental Shelf Lands Act, 43 USCA § 1331, et seq.

phibious seaman out of him to make maritime principles the source of his (and his heirs') rights. But this Circuit has struggled long and hard with who is a "seaman", and I do not think those efforts were meant to be disturbed by the Supreme Court in the context of an airplane crash. To establish the ship-related status, I would apply by analogy the test announced in Offshore Co. v. Robison, 5 Cir., 1959, 266 F.2d 769, and just recently followed in Brown v. ITT Rayonier., 5 Cir., 1974, 497 F.2d 234. The main question under that test is whether "the duties which he performed contributed to the function of the vessel as to the accomplishment of its mission . . . ." Offshore Co. v. Robison, *supra,* at 779. The important thing is the particular mission of that vessel, not necessarily that of an ocean liner or the Weehawken Ferry.
In this case,

> [s]ince the platform was unmanned it was necessary that there be daily transportation from shore to platform and back to shore for those engaged in and supervising the work period. Also, of course, various materials, supplies, and equipment had to be transported to and from shore. . . . Each day for the period after it arrived from shore and until it returned to shore, the CARRYBACK remained in the vicinity of the platform, acting as a service and standby vessel. . . . the DEI supervisor, Monk, came aboard her to do office work where he could be away from the wind and noise of the platform and in air-conditioned surroundings.

499 F.2d at 267. While aboard M/V Carryback, Monk was certainly making a substantial contribution to that mission, because his needs were one of the important reasons the vessel was employed and there.

In *Brown, supra,* it was held appellant was not a "crew member", but Brown spent only about 1% of his employment time aboard any vessel. Even at that the Court recognized that the second part of the *Offshore* test (permanent assignment) should not be rigidly applied. *See,* Braniff v. Jackson Ave.-Gretna Ferry, Inc., 5 Cir., 1960, 280 F.2d 523, *rehearing denied,* 1961, 289 F.2d 939. In this case, Monk's employer required him to spend a substantial amount of time aboard M/V Carryback.

It at least appears to me that the Court has broken from the established rule in this Circuit—and its result appears contrary, also, to that in other Circuits, e.g., Slatton v. Martin K. Eby Construction Co., 8 Cir., 1974, 506 F.2d 505; and Lewis v. Roland E. Trego & Sons, 4 Cir., 1974, 501 F.2d 372, Both those cases recognize (i) the question is not whether the worker was directly involved with the vessel's *navigation,* but rather its function and (ii) the worker need not be exclusively assigned to duties on the vessel.

Finally, this Reverian "one-if-by-land, two-if-by-sea", United States v. Ingham, 5 Cir., 1974, 502 F.2d 1287, 1290, approach, in which the very same person (Monk) on the very same vessel (M/V Carryback) for the very same catastrophe growing out of the very same acts or non-acts has rights measured under two antithetical standards depending on who is the pursued, introduces awful technicalities which in its generous liberality of both substance and procedure is anathema to the admiralty.

I would reverse the panel on the merits of this issue. But at the least it deserves reconsideration by the whole Court, considering the volume of OCSLA cases in the Fifth Circuit in the Nation's quest for precious energy.